No. 91-767-CFX
Status: GRANTED

Title: Republic National Bank of Miami, Petitioner
v.
United States

Docketed:
October 31, 1991

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Beiley,Stanley A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 31 1991	G	Petition for writ of certiorari filed.
3	Dec 5 1991		Order extending time to file response to petition until January 3, 1992.
4	Jan 3 1992		Order further extending time to file response to petition until January 17, 1992.
6	Jan 17 1992		Brief of respondent United States in opposition filed.
5	Jan 22 1992		DISTRIBUTED. February 21, 1992
7	Jan 24 1992	X	Reply brief of petitioner Republic National Bank of Miami filed.
8	Feb 24 1992		Petition GRANTED.
			**********
10	Apr 3 1992		Order extending time to file brief of petitioner on the merits until April 23, 1992.
11	Apr 22 1992		Joint appendix filed.
12	Apr 22 1992		Brief of petitioner Republic National Bank of Miami filed.
14	May 16 1992		Order extending time to file brief of respondent on the merits until June 12, 1992.
15	Jun 12 1992		Brief of respondent United States filed.
16	Jun 17 1992		Record filed.
		*	Original proceedings U.S. Court of Appeals, Eleventh Circuit and U. S. District Court, S.Dis. Florida (1 Box)
17	Jul 10 1992		CIRCULATED.
18	Jul 14 1992	G	Application (A92-39) extension of time to file reply brief on the merits, submitted to Justice Kennedy.
19	Jul 14 1992		Application (A92-39) granted by Justice Kennedy extending the time to file until August 15, 1992.
20	Jul 21 1992		SET FOR ARGUMENT MONDAY, OCTOBER 5, 1992. (2ND CASE).
21	Aug 12 1992	X	Reply brief of petitioner filed.
22	Oct 5 1992		ARGUED.

91-767

Supreme Court, U.S.
FILED
OCT 31 1991
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a stay or supersedeas bond is necessary to preserve appellate jurisdiction in a civil forfeiture case?

PARTIES TO THE PROCEEDING

Petitioner: Republic National Bank of Miami, a national banking association.*

Respondent: United States of America

*Other parties below:***

Thule Holding Company

Indalecio Iglesias

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* Pursuant to Sup. Ct. R. 29.1, Republic is a wholly owned subsidiary of Republic Banking Corporation of Florida, a Florida corporation. There are no non-wholly owned subsidiaries of Republic.

** As this is a civil forfeiture action, the property, One Single Family Residence Located at 6960 Miraflores Avenue, was the "defendant" in the courts below.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Republic National Bank of Miami ("Republic") hereby petitions for a writ of certiorari and requests that this Court grant the petition, vacate the judgment of the court of appeals and order the court of appeals to reinstate Republic's appeal.

REFERENCE TO OPINIONS BELOW

The opinion of the court of appeals is reported as *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 932 F.2d 1433 (11th Cir. 1991), and is reproduced in the Appendix to this Petition at pages A-1-9. The memorandum opinion of the district court is reported as *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 731

F.Supp. 1563 (S.D. Fla. 1990), and is reproduced in the Appendix to this Petition at pages A-10–29.

JURISDICTION

The judgment appealed from was rendered by the Eleventh Circuit Court of Appeals on June 10, 1991. A-1–9. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order dated August 7, 1991. A-34–35. This Court's jurisdiction to review the judgment by writ of certiorari is invoked under 28 U.S.C. §1254(1).

RULES AND STATUTES INVOLVED

This Petition involves Rule 3(a) of the Federal Rules of Appellate Procedure, which provides:

> **Rule 3. Appeal as of Right — How Taken**
>
> (a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. §1292(b) and appeals in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

STATEMENT OF THE CASE

The Government filed this action under 21 U.S.C. §881(a)(6), seeking civil forfeiture of a single family home located in Miami, Dade County, Florida. Petitioner Republic held a mortgage which encumbered the home and filed its Answer and Verified Claim as mortgagee. By Stipulation and Court Order, the real property was sold during the pendency of the case for

approximately $1 million, which was turned over to the United States Marshal for the Southern District of Florida as a substitute for the real property.

After a trial on the merits, the district court entered judgment denying Republic's mortgage claim and forfeiting the property. A-30–33. Republic timely filed its notice of appeal but did not post a bond to supersede the district court's judgment. Thereafter, at the *ex parte* request of the Government, the United States Marshal transferred the cash proceeds to the Asset Forfeiture Account of the United States Treasury. The Government then moved to dismiss the appeal, which motion was granted by a panel of the Eleventh Circuit. A-36–37. Republic unsuccessfully petitioned for rehearing and suggestion for rehearing *en banc*. A-34–35.

In its Opinion, the Eleventh Circuit held that once the Government transferred the cash proceeds of the sale to the Asset Forfeiture Account purportedly outside of the Southern District of Florida, both the district court and the appellate court were divested of jurisdiction. A-5–6. The court ruled that *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988), "controls the result in this case." A-5. In *One Lear Jet*, the Eleventh Circuit, in a sharply divided 6-5 decision, ruled that "because removal of the *res* from a court's territorial jurisdiction destroys the court's *in rem* jurisdiction, this Court does not have jurisdiction to hear [the claimant's] appeal." 836 F.2d at 1573 (Citations omitted.) In the decision below, the Panel rejected all of Republic's contentions, including that the court continued to have *in personam* jurisdiction even after the *res* was removed by the Government. A-6–7. Republic's Petition for rehearing and suggestion for rehearing *en banc* cited to the then published cases discussed in this petition.[1]

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[1] Since the filing of Republic's Petition for Rehearing, the First, Third and Eleventh Circuits have issued published decisions which are discussed in this Petition.

REASONS FOR GRANTING THE WRIT

There is presently a direct, recurring and irreconcilable conflict among nine of the circuits on the jurisdictional issue presented which shows no sign of resolution. Specifically, the First, Second, Third and Fourth Circuits have expressly and directly rejected the ruling and rationale of the Eleventh Circuit below and hold that a court has jurisdiction of a civil forfeiture action even if the Government removes the *res*. Conversely, the Sixth, Seventh, Ninth and Eleventh Circuits adhere to the rule that the court loses jurisdiction once the Government removes the *res*. The Fifth Circuit has two lines of cases which conflict with each other on this issue.

This issue is of great significance. Civil forfeiture actions are a major weapon of the United States in its war on drugs. The Government currently holds in excess of $1 billion in forfeited non-cash property.[2] In fiscal year 1989, the Government collected over $600 million in forfeited cash.[3] In 1990, of the 31,763 federal civil cases commenced by the Government, 6,019, or approximately 20%, were forfeiture or penalty cases.[4]

Appellate review is an important fundamental right in all proceedings. It is critical in civil forfeiture actions because the Government can forfeit property merely by showing probable cause that the property it seeks to forfeit has been used, is intended for use, or was acquired in violation of a criminal statute. *E.g., United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1281-82 (9th Cir. 1983). Probable cause, in itself a low burden of proof, can be established, and usually is, by hearsay evidence of undisclosed government informants. 702 F.2d at 1282-83. Claimants asserting the "innocent owner" defense

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[2] General Accounting Office June, 1991 Report to Congressional Requesters "Asset Forfeiture Noncash Property Should Be Consolidated Under the Marshals Service," at 5.

[3] *Id* at 4.

[4] Table C2, Administrative Offices of the U.S. Courts, Analyses and Reports Board, Statistics Division.

have the burden of proving a negative. *United States v. Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 906 (11th Cir. 1985). Appellate review is therefore the last recourse of a party whose property or property interest has been forfeited. To eliminate the right of appeal because the losing party does not (or cannot) post a bond to prevent the Government from removing the forfeited property from an artificially defined territory during the appeal is unfair and illogical.

The issue, whether a claimant seeking to appeal an adverse forfeiture judgment must obtain a supersedeas bond in order to appeal, raises important and recurring questions of federal appellate jurisdiction. Resolution of the conflict among the circuits is necessary to end the anomaly that in approximately half of the United States, a claimant can seek appellate review of a Government forfeiture of his property simply by filing a notice of appeal, Rule 3(a), Fed.R.App.P., while in the other half of the country, to prevent the Government from defeating jurisdiction, a claimant must file a notice of appeal *and* post a supersedeas bond. In light of the Government's increasing use of the civil forfeiture statutes to seize property, this is an issue of immense importance which only this Court can now settle.

THE CIRCUITS ARE IN CONFLICT AS TO WHETHER A SUPERSEDEAS BOND IS NECESSARY TO APPEAL FROM A CIVIL FORFEITURE JUDGMENT.

By statute and court rule, civil forfeiture proceedings follow the *in rem* rules of admiralty. 21 U.S.C. §881(b); Supplemental Rules for Certain Admiralty and Maritime Claims. Admiralty jurisdiction historically was based on the "long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment." *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 22-23 (1960). The consequence of this legal fiction is that in admiralty cases, "[t]he presence of the res within a Court's territorial jurisdiction is necessary before the Court can proceed to adjudication." *L.B.*

Harvey Marine, Inc. v. M/V "River Arc", 712 F.2d 458, 459 (11th Cir. 1983). Thus, "where the res is no longer before the court, its in rem jurisdiction is destroyed, and any appeal from its decision is rendered moot." *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361, 1362 (11th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983).

The majority opinion in *One Lear Jet, supra*, relied on this body of admiralty case law, specifically following *Taylor* and *Harvey*, to dismiss an appeal from a judgment forfeiting an aircraft, because the Government flew the aircraft out of the jurisdiction. Both the dissent in *One Lear Jet* and the cases which have rejected the majority opinion have attacked the application of this admiralty rule to civil forfeiture cases.

One Lear Jet was a sharply divided 6 to 5 decision of the Eleventh Circuit *en banc*. Three judges wrote separate dissenting opinions. The late Judge Vance wrote a lengthy dissenting opinion in which he sharply criticized the majority's analysis: "The majority opinion is disturbing on three different levels. In an important respect it offends fundamental principles of fairness. It also represents a departure from common sense. Finally, it is analytically flawed." 836 F.2d at 1577. As discussed below, the subsequent opinions of several circuits which have rejected the majority opinion in *One Lear Jet* have specifically relied upon Judge Vance's dissenting opinion.

Judge Clark wrote a separate dissenting opinion, in which he reasoned that prior admiralty cases and a line of Fifth Circuit authority had relaxed the requirement that appellate jurisdiction depends upon the location of the *res* within the territorial jurisdiction of the court. Judge Clark rejected the majority's position that the claimant should have posted a supersedeas bond to preserve the right to appeal:

> In other types of proceedings, when a judgment for property is rendered, the losing party has a choice. He need not post a bond. He can still appeal the judgment. If he wins on appeal, he can bring an action to recover his property or its value.

> The rules established by the court today enables the United States to defeat the right to appeal a forfeiture judgment for mobile property if the losing party has insufficient funds to post a bond.

836 F.2d at 1584.

Judge Edmondson wrote a third dissenting opinion. In his view, the court had *in personam* jurisdiction: "[W]hen a plaintiff comes into a court system requesting the courts' assistance in resolving a case, the plaintiff submits its person to the jurisdiction of those courts until the case is finally concluded ...." *Id.*

Since *One Lear Jet,* three circuits have followed the dissenters in *One Lear Jet,* and one other circuit has followed the dissenters where money is forfeited. On the other hand, three circuits have agreed with the majority opinion in *One Lear Jet.* One circuit has cases which follow both views.

The first case to address the issue after *One Lear Jet* was *United States v. Aiello,* 912 F.2d 4 (2d Cir. 1990), *cert. denied,* _____ U.S. _____, 111 S.Ct. 757 (1991), in which the Second Circuit held:

> We think the dissenters in *One Lear Jet* have the better of the argument. As they point out, the concepts of continuing territorial presence and control in forfeiture actions derive from the admiralty fiction of a ship's personality, a legal construct of dubious validity. With the force of these concepts diminishing in admiralty, they surely ought not to be routinely invoked to deny citizens an opportunity for appellate review of judgments forfeiting their property to the Government.

912 F.2d at 6-7 (citations omitted).

Thereafter, in *United States v. $95,945.12,* 913 F.2d 1106 (4th Cir. 1990), the Fourth Circuit also rejected the majority opinion in *One Lear Jet:*

> We find the dissent in *One Lear Jet* persuasive. . . . That rule was based on the antediluvian approach that conceived of the ship as "the offending thing" which allowed actions only against the ship. Such an approach, reminiscent of deodand, however, has been in decline for years, having been weakened by both the Supreme Court and lower courts . . . . We conclude that invocation of the *in rem* rule is particularly inapposite to defeat jurisdiction in a government-initiated civil forfeiture action.

913 F.2d at 1108-09. The Fourth Circuit quoted with approval Judge Vance's statement that

> [f]orfeiture actions are unique in that they are the only proceedings where the government may confiscate private property on a mere showing of probable cause . . . . [T]o [then] eliminate the right of appeal, the most important safeguard against abuse, is indeed a drastic step.

Id. at 1109. The court also explained that

> unlike the typical case where the defendant ship stealthily absconds from port and leaves the plaintiff with no *res* from which to collect, here the defendant *res* is in the possession of the United States and thus in no danger of disappearing.

Id. The Fourth Circuit agreed with the dissenters in *One Lear Jet* that "by initiating the forfeiture proceeding in the district court, the government has subjected itself to this court's *in personam jurisdiction* . . . . [and] should not be allowed to escape 'through its subsequent jurisdictional exceptions' to the claimant's appeal." *Id.*

The First Circuit addressed the issue in *United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417 (1st Cir. 1991), and aligned itself with the Second and Fourth Circuits:

> We are persuaded by the dissenters in *One Lear Jet* and the Second and Fourth Circuits that the time has come to jettison the "no res, no jurisdiction" rule. There is no good reason why the government should be allowed to insulate

> itself from the appellate process by wrapping itself in the mantle of an admiralty fiction designed at an earlier time to meet a problem totally unrelated to present day civil forfeiture proceedings.

938 F.2d at 1419-20. The court rejected the view that the Government can defeat appellate jurisdiction by moving money from one Government bank account to another:

> Jurisdiction based on the location of the res is particularly inapposite to a currency forfeiture case. The government has possession and control of the currency from the time it seizes it. The execution of the judgment merely transfers it from one government pocket to the other. Basing jurisdiction on what pocket contains the currency is nothing more than a shell game.

938 F.2d at 1420. The First Circuit specifically disagreed with the Eleventh Circuit's holding that a claimant must obtain a supersedeas bond in order to appeal:

> In addition to being bereft of logic it is also unfair. As Judge Clark pointed out in *One Lear Jet*: "In other types of proceedings when a judgment for property is rendered, the losing party has a choice. He need not post a bond. He can still appeal the judgment. If he wins on appeal he can bring an action to recover the property or its value."

Id.

The Third Circuit arrived at the same conclusion in cases involving currency forfeitures. In *United States v. $1,322,242.58*, 938 F.2d 433 (3d Cir. 1991), the Third Circuit held that the court retained appellate jurisdiction even though the Government had transferred the currency from the Justice Department's Seized Asset Deposit Fund to another treasury account, the Justice Department's Asset Forfeiture Fund. The court explained:

> [W]e do not think that rules concerning physical location can be applied in any meaningful sense to an incorporeal *res*

> such as that involved in this case. The *res* at issue here is merely an entry in a Justice Department account with the United States Treasury. In other words, the *res* is an obligation on the part of the Treasury to disburse the specified sum to the Department of Justice. Deeming this obligation to be located at any particular place within the United States would be a complete fiction. If we are compelled, however, to determine where this obligation is "located," we cannot say that the obligation does not exist in every part of the country, including the District of Delaware.

938 F.2d at 437-38.

The dissenters in *One Lear Jet* have not, however, had unanimous success in persuading other courts. In two unpublished decisions, the Sixth Circuit, citing the majority opinion *One Lear Jet* as well as other decisions, dismissed two civil forfeiture appeals where the property was sold and the proceeds distributed. *United States v. One 1984 Mercedes,* Case Number 90-3674 (6th Cir. March 29, 1991); *United States v. Cadillac Sedan de Ville,* 1991 WL 89935 (6th Cir. May 30, 1991). The Seventh Circuit, in *United States v. Tit's Cocktail Lounge,* 873 F.2d 141 (7th Cir. 1989), adhered to the rule that "[j]urisdiction in such in rem actions is based on the res being located in the district court's territorial jurisdiction, and removal of the res divests this court of appellate jurisdiction." 873 F.2d at 143. Similarly, the Ninth Circuit, in *United States v. $29,959,* 931 F.2d 549 (9th Cir. 1991), reiterated the rule that "jurisdiction in an *in rem* action therefore generally ends with the removal of the res." 931 F.2d at 551.[5]

The Eleventh Circuit's dismissal of the appeal in this case and denial of Republic's *en banc* suggestion signify that the Eleventh Circuit is not willing to reconsider its 6-5 ruling in *One Lear Jet.* Since that decision, the Eleventh Circuit has twice

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[5] The Eighth Circuit has not addressed the issue in civil forfeiture cases, but does follow the rule in admiralty cases. *See Bank of New Orleans & Trust Co. v. Marine Credit Corp.,* 583 F.2d 1063 (8th Cir. 1978). The Tenth and D.C. Circuits are the only Circuits which have not addressed the issue raised by this Petition.

acknowledged the conflict among the circuits but has adhered to its view on this issue. *United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties*, 941 F.2d 1428, 1436 n.18 (11th Cir. 1991) (*en banc*); *United States v. Certain Real and Personal Property*, _____ F.2d _____, 5 FLW Fed. C.1650 (11th Cir. October 4, 1991).

The division among the circuits is fully developed and ripe for adjudication and resolution by this Court.[6] The conflict includes sharp disagreements on every aspect of the jurisdictional issue. For instance, a panel of the Ninth Circuit has reasoned that in a currency forfeiture case, once the funds are paid into the United States Treasury, a court cannot constitutionally compel the Government to repay the money since such an order "would require an impermissible payment of public funds not appropriated by Congress." *United States v. $57,480.05 United States Currency*, 722 F.2d 1457, 1459 (9th Cir. 1984). The Second Circuit, in *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990), *cert. denied*, _____ U.S. _____, 111 S.Ct. 757 (1991), expressly rejected that reasoning, stating that

> [w]e do not believe that funds collected by the United States pursuant to a judgment of the District Court are insulated by the Appropriations Clause from return to the rightful owner in the event of a reversal of that judgement simply because the funds are held in the Treasury during the course of the litigation.

The Third Circuit, in *$1,322,242.58 supra*, and the Fourth Circuit, in *$95,945.18, supra*, have both agreed with the Second Circuit on this point.

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[6] The Fifth Circuit has not issued an opinion on the subject since *One Lear Jet*. In two prior opinions, however, it seemingly has agreed with both the majority and dissenting views. *Compare United States v. $79,000 in United States Currency*, 801 F.2d 738, 739 (5th Cir. 1986) ("[w]here no supersedeas is filed or steps taken to supersede judgment and the marshal surrenders custody, neither the district court nor the appellate court retains in rem jurisdiction") *with United States v. An Article of Drug*, 725 F.2d 976, 984 (5th Cir. 1984) ("[W]e refuse, in this case, to elevate form over substance. Both the controversy and the parties being before the court, the action is not moot and need not be dismissed.")

The Eleventh Circuit's opinion in *One Lear Jet*, and the circuit decisions which follow it, are also inconsistent with this Court's admiralty decisions and cases which have all but eliminated the distinctions between *in personam* and *in rem* bases for jurisdiction.

In the admiralty area, this Court, in *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960), severely criticized the ancient admiralty fiction. This Court recognized that the fiction was created to broaden jurisdiction: "A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached and it can be very useful for this purpose still." 364 U.S. at 23. Based on this understanding of the purpose for the rule, this Court rejected the application of the admiralty fiction to defeat a *forum non conveniens* transfer of an admiralty case to a jurisdiction other than where the ship was found:

> We are asked here, however, to transplant this ancient saltwater admiralty fiction into the dry-land context of *forum non conveniens*, where its usefulness and possibilities for good are questionable at best. In fact, the fiction appears to have no relevance whatever in a District Court's determination of where a case can most conveniently be tried. A fiction born to provide convenient forums should not be transferred into a weapon to defeat that very purpose.

Id. In its opinion, this Court quoted with approval its earlier opinion, in *British Transp. Comm. v. United States*, 354 U.S. 129, 139 (1957), in which this Court observed: "Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been a forerunner in eliminating from other federal practices."

There have been similar developments in the law relative to *in personam* and *in rem* jurisdiction. Initially, there was a body of law requiring, as a prerequisite for *in rem* or *quasi in rem* jurisdiction, that the res be "seized" by the court. *See Pennington*

v. Fourth National Bank, 243 U.S. 269 (1917) ("[t]he only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard"). This body of law must be considered in the context of what was then a narrow definition of *in personam* jurisdiction. At that time *in rem* jurisdiction expanded the opportunity for claims to be heard and wrongs to be corrected. *See Pennoyer v. Neff*, 95 U.S. 714 (1877).

With the expansion of *in personam* jurisdiction, *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), the distinction between the *in personam* and *in rem* jurisdictional bases began to fade, culminating in this Court's opinion in *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977): "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." This Court concluded in *Shaffer* that the *International Shoe* "minimum contacts" analysis must measure "all assertions of state-court jurisdiction." *Id. See Burnham v. Superior Court*, _____ U.S. _____, 110 S. Ct. 2105, 2116 (1990), which explains "[t]he logic of *Shaffer's* holding — which places all suits against absent non-residents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact ...."

We submit that the decision below cannot be reconciled with these precedents of this Court. Virtually all of the circuits have issued decisions on this important issue of appellate jurisdiction. The circuits are equally divided. This fully developed conflict among the circuits should be resolved by this Court at this time.

CONCLUSION

This Court should grant the petition for writ of certiorari, vacate the judgment below, and order the appellate court below to reinstate Republic's appeal.

Respectfully submitted,

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APPENDIX

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UNITED STATES OF America,
Plaintiff-Appellee,

v.

ONE SINGLE FAMILY RESIDENCE
LOCATED AT 6960 MIRAFLORES
AVENUE, etc., Defendant,

Republic National Bank of Miami,
Claimant-Appellant,

Thule Holding Corp., Claimant

No. 90-5295.

United States Court of Appeals,
Eleventh Circuit.
June 10, 1991.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

DYER, Senior Circuit Judge:

This is an appeal of a civil forfeiture case brought by the United States against a parcel of real property situated in the Southern District of Florida. During the pendency of the action below, the real property was sold pursuant to an order of interlocutory sale. The proceeds of the sale were placed in the United States Marshal's account. A final judgment of forfeiture was entered on March 15, 1990. The claimant, Republic National Bank, holder of a mortgage lien on the property, timely filed its notice of appeal, but did not file a motion to stay execution or post a supersedeas bond. On April 20, 1990, the United States Marshal executed the judgment and transferred the proceeds of the interlocutory sale to the Asset Forfeiture Account of the United States Treasury. The United States filed its motion to dismiss the appeal on the ground that this transfer divested this court from

exercising *in rem* jurisdiction over the case. We grant the motion and dismiss the appeal for want of jurisdiction.

Facts

The United States initiated this *in rem* action seeking civil forfeiture of a single family residence located in the Southern District of Florida. The complaint alleged that Indalecio Iglesias owned the property, that he had engaged in narcotics transactions, and had used the proceeds of the transactions to purchase the property. The complaint sought forfeiture under 21 U.S.C. §881(a)(6). Service perfecting *in rem* jurisdiction was made by arresting the defendant property and by giving publication of notice in conformity with Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(4). Additionally, the government sent a notice of the suit to the potential claimant Republic National Bank, who was a mortgagee of the defendant property. Republic filed a claim and answer asserting an "innocent owner" defense.

On May 25, 1988, the government filed an agreed motion seeking a court order authorizing an interlocutory sale of the residence. The motion provided that the proceeds of the sale would be held by the United States Marshal and that the claims to the residence would then attach to the proceeds held by the Marshal, and be subject to the future determination of the court, without prejudice to the rights of any claimant. On May 31, 1988, an order for interlocutory sale was entered by the district court. It provided that all interests of any lienor and claimants would automatically transfer to the proceeds of the sale. The order also instructed the United States Marshal for the Southern District of Florida to retain custody of the proceeds of the sale pending the court's further order. This property was thereafter sold for approximately one million dollars.

During the pendency of the action, the grand jury indicted Indalecio Iglesias in the Southern District of Florida. He was alleged to be the real owner of the property, although Thule

Holding Corporation was the record owner. Iglesias was charged with criminal violations pertaining to the subject residence.

On March 15, 1990, the district court entered a final judgment of forfeiture and directed the United States to dispose of the remaining proceeds of the interlocutory sale, in accordance with law.

Republic timely filed its notice of appeal, but did not file a motion to stay execution of the final judgment or post a supersedeas bond. On April 20, 1990, the United States Marshal executed the judgment and transferred the proceeds of the interlocutory sale to the Asset Forfeiture Account of the United States Treasury.

Contentions of the Parties

On the merits of this appeal, Republic, as mortgagee, seeks to reverse the judgment of forfeiture against it for two reasons. First, it argues that the district court erred in applying a "constructive knowledge", instead of an "actual knowledge", standard to forfeit Republic's mortgage; and second, the court utilized clearly erroneous findings of fact on which to base its legal conclusions. Since the government's motion to dismiss the appeal is dispositive, we do not reach the merits.

The United States contends that when the United States Marshal for the Southern District of Florida executed the final judgment of forfeiture by transferring the substituted *res* from his custody to the Asset Forfeiture Account, no *res* remained in that district; ergo, the transfer divested the district court and this court from exercising *in rem* jurisdiction in this case.

Republic contends that there is continuing jurisdiction in this court because (1) by enacting 21 U.S.C. § 881(j) Congress modified the requirement that the *res* be within the court's territorial jurisdiction for § 881 forfeiture actions; (2) the district court had *in personam* jurisdiction; (3) there was consent to or estoppel to deny jurisdiction.

Jurisdiction Under 21 U.S.C. § 881(j)

Republic argues that Congress has modified the requirement that the *res* be within the court's territorial jurisdiction for Section 881 forfeiture actions and gives this court continuing jurisdiction to hear this appeal. Section 881(j) provides:

> In addition to the venue provided for in Section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this Section, a proceeding for forfeiture under this Section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

Republic reads the statute to mean that once Iglesias was indicted and found in the Southern District of Florida, the effect, under Section 881(j) is to add two bases, in addition to the fact that the property was located in this district, on which the court continues to have jurisdiction even after the property is removed from the district.

We find no support for this novel proposition. By its clear terms Section 881(j) simply affords the government a choice of venue as to where to bring a forfeiture action. It may choose to prosecute the forfeiture action either in the district where the *res* is located, in the district of the criminal prosecution, or the district in which the owner is found. This choice does not extend to claimants. Here the *res*, which was alleged to be owned by Iglesias, was forfeited in the Southern District of Florida. Republic filed its claim in the same district. The fact that Iglesias was indicted in the same district after the institution of the forfeiture proceedings is of no moment. Nor does the fact that Iglesias was found in the Southern District of Florida give continuing jurisdiction after the *res* has been removed. He never filed a claim and was never a party to the lawsuit. Finding Iglesias in the district was not necessary to effect the *in rem* forfeiture. Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(4)

only requires publication and seizure of the defendant property to notify potential claimants. The only basis for jurisdiction in this case is that the defendant property was located and arrested in this district. Accordingly, we find the provisions of Section 881(j) to be irrelevant to this Action.

United States v. One Lear Jet Aircraft, 836 F.2d 1571 (11th Cir.) (en banc), *cert. denied*, 487 U.S. 1204, 108 S.Ct. 2844, 101 L.Ed.2d 881 (1988) controls the result in this case. There the government initiated a forfeiture proceeding against a Lear Jet aircraft located in the Southern District of Florida pursuant to 8 U.S.C. § 1324(b). The aircraft had been used to enter the United States by persons who made material misrepresentations on their visa applications. Leybda Corporation filed a claim to the aircraft, but, after trial, the district court entered a judgment of forfeiture for the United States. Leybda filed a timely notice of appeal, but did not file a motion for stay or judgment or a supersedeas bond. The government executed the judgment by removing the aircraft to Missouri. On *en banc* reconsideration of this *in rem* jurisdictional issue, the court held that:

> We now hold that, because removal of the *res* from a court's territorial jurisdiction destroys that court's *in rem* jurisdictional, *Pennington v. Fourth National Bank*, 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713 (1917), this Court does not have jurisdiction to hear Leybda's appeal. The general rule of *in rem* jurisdiction is that the court's power derives entirely from its control over the defendant *res*. *Id.* at 272, 37 S.Ct. at 283; *L.B. Harvey Marine, Inc. v. M/V River Arc*, 712 F.2d 458, 459 (11th Cir. 1983). Where an appellant fails to file a stay of judgment or a supersedeas bond, and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction. *Taylor v. Tracot Marine, Inc.*, 683 F.2d 1361, 1362 (11th Cir. 1982), *cert. denied*, 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); *Parks v. B.F. Leaman & Sons, Inc.*, 279 F.2d 529, 532 (5th Cir. 1960). This Circuit has recently reaffirmed this

traditional rule. *See Harvey Marine*, 712 F.2d at 459; *Taylor*, 683 F.2d at 1362.

Id. at 1573. We reiterated this rule in *United States v. One 1983 Homemade Vessel Named Barracuda*, 858 F.2d 643, 647 (11th Cir. 1988).

In *United States v. $57,480.05 U.S. Currency and Other Coins*, 722 F.2d 1457 (9th Cir. 1984), after a judgment of forfeiture was entered, the United States Marshal executed the judgment by delivering the funds held by him to the United States Attorney, who caused them ultimately to be paid into the United States Treasury. The claimant never sought a stay of execution of the judgment. The court dismissed the appeal holding that:

> In conducting this forfeiture proceeding, the district court was exercising *in rem* jurisdiction and the currency was the *res*. The power of the court derived entirely from its control over the defendant *res*. (citations omitted). Release or removal of the *res* from the control of the court ended the jurisdiction of the court, in accordance with the general rule.
>
> * * * * *
>
> The destruction of the district court's jurisdiction puts an end to ours as well. Were we to reverse the judgment of the district court, there would be no *res* upon which our mandate could operate. (citation omitted).

Id. at 1458-59.

Republic's attempt to avoid the impact of *One Lear Jet* by the misapplication of 21 U.S.C. § 881(j) is unavailing.

In Personam Jurisdiction

Republic asserts that even though this case was commenced as an *in rem* forfeiture action, once the government personally served Republic with process, and Republic filed a general ap-

pearance, this case became, as between Republic and the government, one involving both *in rem* and *in personam* jurisdiction. Therefore, even if the court lost *in rem* jurisdiction over the *res*, there would be continuing jurisdiction to hear this appeal.

The short answer to this argument is that this forfeiture action was initiated under Rule C of the Supplemental Rules. The defendant is the property. Under this Rule, the only requirement for *in rem* jurisdiction is that upon the filing of the complaint, there must be a publication of notice that the property has been arrested. The claimants are invited to file claims. Republic was not a named defendant and was not summoned into court under Fed.R.Civ.P. 4. Although not required to do so, the government served potential claimants with copies of the complaint and warrant of arrest of the defendant property, which notified them that the *res* was subject to forfeiture. Like *One Lear Jet*, the government never invoked *in personam* jurisdiction when it brought suit. It served the property, not the purported mortgagee who later filed a claim. Its jurisdiction was based solely on the *res;* the government did not consent to the court's *in personam* jurisdiction. It merely brought a forfeiture action against the defendant property. As the court there held:

> [W]e reject the notion that the United States consented to *in personam* jurisdiction by invoking the district court's *in rem* jurisdiction initially. To hold that the government "consented" to *in personam* jurisdiction would be tantamount to deciding that a court has *in personam* jurisdiction over any participant in an *in rem* proceeding. This does not comport with the traditional analysis of *in rem* jurisdiction. (Footnotes omitted).

Id. at 1576-77. The United States cannot be construed as consenting to *in personam* jurisdiction merely by notifying potential claimants that an *in rem* action has commenced.

Consent to or Estoppel to Deny Jurisdiction

In May 1988, at the government's request, Republic agreed to an interlocutory sale of the property. The agreed motion states in pertinent part:

> All present or possible liens or other claims to the defendant property will attach to the proceeds held by the Marshal, and will be subject to future determination by the court without prejudice to the right of any claimant.

The district court's order, entered upon the motion states, in pertinent part, that "all interests of any lienors and claimants shall automatically transfer to the proceeds of the sale. These interests shall be afforded the same priority on the proceeds as these interests had on the real property...." Further, the proceeds were payable "to the United States Marshal for the Southern District of Florida, who shall retain same in his custody pending this court's further order." Republic argues that the "without prejudice" agreement for the interlocutory sale of the property constituted the government's consent to the continued jurisdiction of this court, regardless of what happened to the substituted *res*. Moreover, Republic submits that the government's conduct in obtaining Republic's consent to a physical change in the *res* by announcing it would be "without prejudice", and then utilizing the physical change to prejudice Republic by defeating jurisdiction prompts the application of the principle that where removal of the *res* from the court's territorial jurisdiction is accidental, fraudulent or improper, removal of the *res* does not defeat *in rem* jurisdiction.

We do not agree with Republic's conclusions drawn from its reading of the agreed motion and the order entered thereon. Republic's lien on the defendant property attached to the proceeds of the sale, subject to the future order of the court. It litigated its claim and pursued all of its remedies against the proceeds just as they could have been asserted against the defendant real property. The final judgment of forfeiture ordered the United States to dispose of the proceeds according to law.

Republic had the option to move for a stay of execution or post a supersedeas bond to stay the release of the substituted *res*. It did neither. By complying with the district court's order, the government's conduct in executing upon the judgment was neither fraudulent nor improper. *One Lear Jet*, 836 at 1574 n. 2. *See United States v. $79,000 in U.S. Currency*, 801 F.2d 738 (5th Cir. 1986).

Conclusion

This appeal is DISMISSED for want of jurisdiction.

UNITED STATES of America, Plaintiff,

v.

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 MIRAFLORES AVENUE, CORAL GABLES, FLORIDA. Also Known As Lot 10, in Block 14, of Cocoplum Section 2 Plat "B", According to the Plat Thereof, as Recorded in Plat Book 115, at Page 84 of the Public Records of Dade County, Florida, Together With All Buildings, Fixtures and Appurtenances Thereto and All Improvements Thereon, Defendant.

No. 88-0349-CIV.

United States District Court,
S.D. Florida.

Feb. 21, 1990.

Stanley Beiley, Miami, Fla., for defendant Republic Nat. Bank.

Alan Dagen, Asst. U.S. Atty., Miami, Fla., for U.S.

MEMORANDUM OPINION

SCOTT, District Judge.

This controversy presents serious issues involving the civil forfeiture law, 21 U.S. C. § 881, and its impact upon lending institutions. It brings into play the duties and obligations of a commercial lending institution when unmistakable "red flags" have been raised as to the involvement of drug-related proceeds in a financial transaction. Concomitantly, it presents to the Court the duty to define the standard of conduct for lending institutions in such cases. We venture forward fully cognizant of this opinion's precedent-setting nature.

I. HISTORY OF THE CASE

The United States brings this *in rem* action[1] for forfeiture of real property located at 6960 Miraflores Avenue, Coral Gables, Florida.[2] The Government alleges that Indalecio Iglesias was the true owner of the property and that he has engaged in a continuing series of narcotics-related transactions in violation of 21 U.S.C. §§ 841(a)(1) and 846, resulting in over 100 million dollars in illegal proceeds. The Government further alleges that Iglesias used these illegal proceeds to purchase the defendant real property.

Thule Holding Corporation ("Thule"), a Panamanian corporation, filed its claim and answer as the record owner of the property. Initially, Thule alleged that it had no knowledge of any illegal activities related to the real property. However, shortly before trial, Thule executed a stipulation of settlement and consent to forfeiture.

Republic National Bank of Miami ("Republic") filed its claim and answer asserting an $800,000.00 lien interest in the real property pursuant to a mortgage and security agreement recorded September 30, 1987. The issues between Republic and the Government were tried to the Court on June 27 and 28, 1988. The questions litigated included probably cause, relation back and innocent ownership.

Following submission of the case, the Government moved to reopen the evidence, claiming that a previously undisclosed witness had critical evidence. After initially opposing the motion, Republic withdrew its opposition, provided that it could offer appropriate rebuttal evidence. That request was honored.

In October 1988, the trial resumed with the Government's witness, Rene J. Leonard, followed by a number of Republic's

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[1] The Court has jurisdiction pursuant to 28 U.S.C. §§1355 and 2461.

[2] Pursuant to stipulation between the parties, with Court approval, the property was sold for $1,050,000 on June 1, 1988. The funds are being held by the United States Marshal pending disposition of this case.

witnesses attacking Leonard's credibility and, thereafter, the Government's efforts to bolster his credibility. In light of the issues involved, the parties were provided ample opportunities to brief the multiple issues and they responded accordingly. Those memoranda have been quite helpful and counsel are commended. Our findings of fact and conclusions of law follow.[3]

II. PROBABLE CAUSE

A. Factual Background

1. Iglesias' Drug-Trafficking Activities

The Government called Drug Enforcement Administration ("DEA") Special Agent Lee Truesdale to establish probable cause.[4] Truesdale testified about his investigation of Indalecio "Andy" Iglesias, based on intelligence gathered through conversations with the Federal Bureau of Investigation ("FBI"), Internal Revenue Service ("IRS") and Customs Service ("Customs").[5]

Special Agent Truesdale testified that, on December 10, 1980, Iglesias was arrested on board a vessel stopped by Customs in which 300 pounds of marijuana were found in a sealed compartment. In April 1981, Iglesias was arrested for possession of 3,000 pounds of marijuana and fined $10,000.00 by Bahamian officials.

Truesdale also offered evidence obtained through "reliable" confidential informants. These informants possessed first-hand

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[3] Fed.R.Civ.P. 52(a); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

[4] The government bears the initial burden of establishing probable cause to believe that the property is derived from illegal drug activities. Once the government has established probably cause, the burden shifts to the claimant, either to rebut the government's evidence or to prove innocent ownership. *United States v. A Single Family Residence*, 803 F.2d 625, (11th Cir.1986).

[5] In a forfeiture proceeding, the government may offer hearsay evidence to establish probable cause. *United States v. A Single Family Residence*, 803 F.2d 625, 629 n. 2 (11th Cir. 1986).

knowledge of Iglesias's drug importation activities. The informants were involved in smuggling both marijuana and cocaine with Iglesias.

Through an informant, Iglesias began to import cocaine from Colombia into the United States. The informant estimated that Iglesias transported approximately 30,000 kilograms of cocaine between 1980 and 1985. Based upon his knowledge, the informant estimated that Iglesias earned 180 million dollars in drug profits between 1980 and 1985. This estimate was based upon Iglesias' charge per kilo ($6,000 to $9,000) for transportation multiplied by the number of kilos (30,000) transported over the five-year period. Iglesias had no legitimate source of income for this time period.

2. Iglesias' Acquisition of Miraflores

During this period between 1980 and 1985, while Iglesias was importing narcotics from Colombia, he was also purchasing expensive property in South Florida. The defendant property located at 6960 Miraflores Avenue, Coral Gables, Florida, was one such property.

In 1983, acting through Thule, a shell corporation, Iglesias purchased the Miraflores lot and partially-constructed residence. Between 1983 and 1984, through a series of agents and contractors, Iglesias continued construction on the Miraflores property. Iglesias and his wife were present at the site and supervised construction of the residence. Iglesias paid one contract between $200,000 and $220,000 across this time period. This contractor was paid $7,000 to $9,000 every week or two weeks, in cash, carried in a briefcase. A second contractor was paid approximately $140,000. About 60% of these payments were in cash. After the house was constructed, Iglesias and his family were the only persons ever to reside at Miraflores.

3. Republic's Mortgage Interest

In August 1987, IRS agents contacted Inocente Hernandez concerning Iglesias. Shortly thereafter, Iglesias called Hernandez to find out whether the IRS had contacted him. Hernandez told Iglesias that the IRS had called to ask questions about Iglesias and the property at Miraflores. Alerted to the investigation, Iglesias immediately began his efforts to recoup his financial investment before possible Government action. Iglesias put the house up for sale and approached Miami lenders to secure a mortgage on the property.

Republic agreed to provide an $800,000 one-year balloon note on the property, which was appraised at $1.2 million. Once the loan was approved, Republic transferred the proceeds to the borrower's Swiss bank account. Iglesias had recently purchased an airplane ticket to Geneva. He has apparently fled the jurisdiction of the United States.

B. Legal Analysis

Republic contends that the Government has failed to show any nexus between the property seized and a particular drug deal. However, Republic "misunderstands the government's burden. The government need not trace the cash to specific transactions, or actually prove by a preponderance of evidence a substantial connection to drug dealing." *United States v. $41,305.00 in Currency and Traveler's Checks*, 802 F.2d 1339, 1343 (11th Cir. 1986). (citation omitted).

The Eleventh Circuit has recently stated the test as follows:

> In demonstrating a substantial connection between the property and illegal drug transactions, the government is not required to show a relationship between the property and a specific drug transaction. The government's burden of demonstrating probable cause is less than prima facie proof but more than mere suspicion.

United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, 893 F.2d 1245 (11th Cir. 1990).[6] In addition, probable cause may be based "wholly on circumstantial evidence, and that evidence may include facts learned after the actual seizure of the money." *$41,305.00*, 802 F.2d at 1343. Applying these principles, the Court makes the following factual findings on the issue of probably cause:

1. The Miraflores lot, with the residence, was worth $1.2 million dollars.

2. Iglesias purchased the Miraflores property through Thule. Thule was a straw owner for Iglesias.

3. Iglesias paid a series of agents and contractors to build a luxury home on the Miraflores lot. The contractors were paid large sums of money, primarily in cash, in payments under $10,000, to avoid the currency reporting laws.

4. Iglesias and his wife were present at the site and supervised construction of the property. Iglesias and his family are the only persons who ever resided at the property.

5. Iglesias is a known drug-trafficker. He has previously been arrested and convicted on narcotics charges.

6. The Court accepts Special Agent Truesdale's testimony that Iglesias earned 180 million dollars from the illegal importation of narcotics during the relevant time-frame. Truesdale's testimony was based on his own investigation, statements of other investigating agents, and statements of a reliable confidential informant. The informant's statements were, in turn, corroborated by the statements of other informants with personal knowledge.

7. Iglesias had no legitimate source of income during this time.

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[6] The "substantial connection" requirement is not found in the statute, but rather in the legislative history. *Four Million, Two Hundred and Fifty-Five Thousand Dollars*, 762 F.2d at 902 n. 14.

8. Iglesias knew that he was under investigation by the IRS, and that the Miraflores property was part of this investigation.

9. As soon as Iglesias became aware of the investigation, he put the house up for sale, secured an $800,000 mortgage loan on the property, and sent the money to a Swiss bank account.

The Court finds that probable cause exists to believe that Iglesias bought the Miraflores property and constructed the residence with drug profits, and then laundered the money through the Republic mortgage into his Swiss bank account. We have judged the facts "not with a clinical detachment, but with a common sense view to the realities of normal life." *Wilson v. Attaway*, 757 F.2d 1227, 1235 (11th Cir. 1985). Under this standard, we have also taken "into account, as a 'common experience consideration,' the fact that Miami has become a known center for drug-smuggling and money-laundering." *Four Million, Two Hundred and Fifty-Five Thousand Dollars*, 762 F.2d at 904; *United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884, 888 n. 4 (11th Cir. 1989). Considering the "totality of the circumstances," *Four Parcels of Real Property*, 893 F.2d 1245, we conclude that the Government has met its burden of showing probable cause to forfeit the property.

III. RELATION BACK

Having established the probable cause requirement, the Government contends that Republic's claim must fail as a matter of law under the relation back doctrine. Under this doctrine, the interest of the United States vests in the property upon commission of the offense giving rise to the forfeiture. 21 U.S.C. § 881(h) (1984 amendment codifying relation back doctrine). A final judgment of forfeiture merely confirms the government's interest and therefore relates back to the time of the offense. Thus, the Government argues that Republic, as a subsequent purchaser, could not have acquired any interest in the property.

The genesis of the Government's position is *United States v. Stowell*, 133 U.S. 1, 10 S.Ct. 244, 33 L.Ed. 555 (1889), decided

over one hundred years ago. In *Stowell,* 133 U.S. at 16-17, 10 S.Ct. at 247, the Supreme Court stated that forfeiture of property to the United States relates back to the time of the offense and "avoids all intermediate sales and alienations, even to purchasers in good faith." The forfeiture statute in *Stowell* applied to property owned by a person who "knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same." *Stowell,* 133 U.S. at 2 n. 1, 10 S.Ct. at 244 n. 1. Thus, the Supreme Court in *Stowell* merely held that "an exception for innocent holders did not prevent forfeiture from relating back in the case of holders who did not qualify for the exception." *Eggleston v. State of Colorado,* 873 F.2d 242, 247 (10th Cir. 1989).

Since *Stowell* was decided, Congress has provided an innocent owner exception to most forfeiture statutes, including the civil forfeiture statute, 21 U.S.C. § 881. The innocent owner exception protects "the interest of an owner" who proves that the offense was committed without its "knowledge or consent." 21 U.S.C. § 881(a)(7). The Government contends, however, that the innocent owner provision only applies to claimants who owned the property at the time of the offense, and not to those who acquired the property afterward. To test the validity of this contention, the Court must review the language and legislative history of the innocent owner provision, 21 U.S.C. § 881(a)(7).

A. Legislative History

Section 881(a)(7) provides that "no property shall be forfeited ... to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." The issue is whether the tern "owner" includes a claimant who acquired an interest in the property subsequent to the offense leading to forfeiture. The plain meaning of the language employed by Congress is the "primary, and ordinarily the most reliable" source of legislative intent. *Public Citizen v. United States Department of Justice,* _____ U.S. _____, 109 S.Ct. 2558, 105

L.Ed.2d 377 (1989). In this case, however, the meaning of the statute is not clear. Moreover, because "statutes always have some purpose," *id.*, a review of the legislative history can only assist the Court in divining Congressional intent.

Congress enacted the innocent owner exception "in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction." Congressional Record-Senate, July 27, 1978, p. S23056 (remarks of Senator Culver). Congress intended "to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur." *Id.* at S23057 (remarks of Senator Nunn).

Thus, Congress believed that the innocent owner exception would protect bona fide purchasers who acquired ownership of the property subsequent to the offense giving rise to the forfeiture. The Government's position to the contrary is simply not supported by the legislative history of the statute.

B. Case Law

The Eleventh Circuit has not had the opportunity to decide whether the relation back doctrine prevents a bona fide purchaser from acquiring an interest in the property subsequent to the offense. Because the Court of Appeals has never denied the claim of a subsequent bona fide purchaser, the applicability of the innocent owner provision remains an open question.

The Government relies on *United States v. $41,305.00 in Currency and Traveler's Checks*, 802 F.2d 1339, 1346 (11th Cir. 1986). However, the court in *$41,305.00* did not reach the issue. Instead, the court merely expressed its doubt that intervention in a forfeiture proceeding could be premised on an interest acquired after the offense. The court stated in dicta: "Illegal use immediately vests title to the property in the sovereign, and cuts off the rights of third parties to obtain legally protectable interests in the property." Because *$41,305.00* was decided on a motion to

intervene, the claimant apparently did not raise the innocent owner exception and the court had no reason to consider the legislative history of that provision. Therefore, in our view, *$41,305.00* is not dispositive of the issue. *See United States v. One Single Family Residence*, 683 F.Supp. 783, 786-87 n. 1 (S.D.Fla. 1988) (Aronovitz, J.) (finding that *$41,305.00* left the issue open for another day).[7]

The remaining cases relied upon by the Government are inapposite. The forfeiture statutes at issue in *Florida Dealers and Growers Bank v. United States*, 279 F.2d 673 (5th Cir. 1960), and *Wingo v. United States*, 266 F.2d 421 (5th Cir. 1959) did not provide an exception for innocent owners.[8] Similarly, in *United States v. Four Parcels of Real Property at Lake Forrest Circle*, 870 F.2d 586 (11th Cir. 1989), and *United States v. One 1967 ChrisCraft 27 Foot Fiber Glass Boat*, 423 F.2d 1293 (5th Cir. 1970), the claimants could not demonstrate innocent ownership and therefore the court did not consider the issue.

As to *United States v. One Piece of Real Estate*, 571 F.Supp. 723 (W.D.Tex. 1983), that court only held that lienholders were not entitled to interest or other charges accruing after the date of the seizure. The court did not hold that the lienholders' interests ended as of the date of the offense. *See also United States v. All That Tract and Parcel of Land*, 602 F.Supp. 307, 313 n. 11 (N.D.Ga. 1985) (rejecting *One Piece of Real Estate*).

At least two courts have held that the innocent owner exception applies to bona fide purchasers, notwithstanding the relation back doctrine. In *Eggleston v. State of Colorado*, 873 F.2d 242, 247 (10th Cir. 1989), the Tenth Circuit held: "Forfeiture therefore cuts off the rights of subsequent lienholders or purchasers, subject to the so-called innocent owners exception in

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[7] The Eleventh Circuit has ordinarily considered the issues together. *See, e.g., United States v. Four Parcels of Real Property on Lake Forest Circle*, 870 F.2d 586, 593-94 (11th Cir.1989) (denying claimant relief because the forfeiture related back *and* the claimant could not prove innocent ownership).

[8] Moreover, the court in *Florida Dealers* remanded for a determination of whether remission or mitigation should be allowed.

section 881(a)(6)." In *United States v. One Single Family Residence*, 683 F.Supp. 783 (S.D.Fla. 1988) (Aronovitz, J.), another court in this district reached the same result. In addition to the legislative history, that court relied on section 881(a)(6), which governs proceeds and therefore contemplates third party recipients. The court also relied in part on the criminal forfeiture statute, which expressly protects bona fide purchasers. *See also United States v. One Parcel of Real Estate*, 715 F.Supp. 360, 363 (S.D.Fla. 1989) (Gonzalez, J.) (Congress did not intend "to place all land titles in doubt because of the 'relation back'" doctrine).

Indeed, more recently, the Supreme Court has suggested that a contrary result would be unconstitutional. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90, 94 S.Ct. 2080, 2094-95, 40 L.Ed.2d 452 (1974), the Court stated:

> [I]t would be difficult to reject the constitutional claim of an owner whose property had been taken from him without his privity or consent.... Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

It is therefore imperative that we give effect to the legislative history of the innocent owner provision, in keeping with our duty "to avoid deciding difficult constitutional questions where the text fairly admits of a less problematic construction." *Public Citizen v. United States Department of Justice*, _____ U.S. _____, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). If the interest of an innocent owner is protected from forfeiture, *a fortiori*, the interest of a bona fide purchaser is also protected. For these reasons, the Court concludes that a bond fide purchaser is entitled to the

protection of the innocent owner exception to the civil forfeiture statute, 21 U.S.C. § 881(a)(7).[9]

IV. INNOCENT OWNERSHIP

Having determined that Republic may assert the innocent owner provision, the Court must now consider whether Republic has met the standard of innocent ownership. To meet the requirements of this provision, the claimant must establish that the offense was committed without its "knowledge or consent." 21 U.S.C. § 881(a)(7). Republic argues that this standard contemplates actual knowledge by the claimant. The Government argues, however, that the claimant must establish that it (1) lacked actual knowledge; (2) lacked constructive knowledge; and (3) did all that reasonably could be expected to prevent the offense. For this third element, the Government cites *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689, 94 S.Ct. 2080, 2094, 40 L.Ed.2d 452 (1974), in which the Supreme Court stated that it might be difficult to reject the due process claim of a person who "had done all that reasonably could be expected to prevent the proscribed use of his property." The forfeiture statute at issue in *Calero-Toledo* did not provide an exception for innocent owners.

The Court notes that the Eleventh Circuit has made conflicting statements about the standard to be applied under the innocent owner provision of the civil forfeiture statute. In *United States v. Four Million, Two Hundred and Fifty-Five Thousand Dollars*, 762 F.2d 895, 906 (11th Cir. 1985), the Eleventh Circuit agreed with the claimant "that the application of the statutory 'innocent owner' defense turns on the claimant's actual knowledge, not constructive knowledge." However, in a footnote, the

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[9] To the extent that *United States v. Walker*, 889 F.2d 1317 (4th Cir. 1989) is to the contrary, we decline to follow it. *Walker* did not concern the precise issue before us. Instead, the court in *Walker* held that the relation back doctrine prevented heirs from acquiring an interest [in] [sic] property subject to forfeiture. Moreover, the court did not even consider the legislative history of the innocent owner provision. For these reasons, we do not find *Walker* persuasive on the issue before us.

court left "for another day the question of the *Calero-Toledo* dicta to forfeiture actions under 21 U.S.C. § 881(a)(6)." *Id.* at 906 n. 24. More recently, the Eleventh Circuit has incorporated the *Calero-Toledo* language into the standard for innocent ownership: "To prevail on a defense of innocent ownership, a claimant must prove not only that it was uninvolved in and unaware of the activity upon which forfeiture is sought, but also that it did everything that reasonably could be expected of it to prevent the activity." *United States v. One 1980 Bertram 58' Motor Yacht,* 876 F.2d 884, 888-89 (11th Cir. 1989).

Republic contends that the record does not demonstrate actual knowledge or consent to the purchase and construction of Miraflores with drug proceeds, or the laundering of money through the Republic loan. This "argument ignores the statutory requirement that the claimant, and not the government, bears the burden of proof on the 'innocent owner' defense. Under 21 U.S.C. § 881(a)(6), the government need not prove, and the district court need not find, that the claimant *had* actual knowledge. Rather, it is the claimant's responsibility to prove the *absence* of actual knowledge." *United States v. Four Million, Two Hundred and Fifty-Five Thousand Dollars,* 762 F.2d 895, 906-07 (11th Cir. 1985).

The Court has found only one reported decision assessing the standard to be applied to a commercial lending institution under the innocent owner provision. In *United States v. A Fee Simple Parcel of Real Property,* 650 F.Supp. 1534 (E.D.La. 1987),[10] the court held that the bank had established innocent ownership on the facts presented because (1) the borrower had a long-standing relationship with the bank; (2) the bank was not aware of any legal problems of the borrower; (3) the bank conducted a title search on the defendant property to ensure that the borrower was the true owner; and (4) even though the bank failed to obtain a financial statement from the borrower, the property was fully secured by collateral.

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[10] The Court is surprised that neither party brought this case to our attention, even though it was decided before this action was filed.

The conduct of the lender in *A Fee Simple* provides a study in contrast with the Miraflores transaction. The Court has distilled the trial record and we make the following factual findings on the issue of Republic's state of knowledge:

1. Thule, the borrower, is a Panamanian shell corporation;
2. The borrower's primary asset is a residence;
3. The residence was vacant at the time;
4. The borrower was about to sell its primary asset;
5. The lender did not ask the purpose of the loan;
6. The lender failed to conduct a title search;
7. The corporate borrower and Antonio Munoz Caballero ("Munoz"), the sole stockholder and a guarantor on the mortgage, were unknown to the lender;
8. Ramon Puentes, the second guarantor, had no known connection with the borrower;
9. Puentes made inconsistent statements of ownership.
10. The lender offered an $800,000 one-year balloon note on property valued at $1.2 million;
11. The borrower had no known source of repayment;
12. Fred de la Mata, president of Republic, was intimately involved in the transaction;
13. The lender quickly approved the loan outside normal channels;
14. The lender cannot document board approval of the loan, although documents indicate the board endorsed the loan after the closing;
15. Puentes, the guarantor, used part of the loan proceeds to buy expensive gifts for the bank president's family, and to buy an airplane ticket to Geneva for Iglesias;

16. The lender transferred the proceeds of the loan to the borrower's Swiss bank account.

There can be no question that the circumstances surrounding approval of the loan were suspicious. Republic was approached by Ramon Puentes, who claimed that he and a "partner" owned the property. However, documents reviewed by the lender show that Thule was the sole owner of the property, and that Thule's stock was, in turn, wholly owned by Antonio Munoz Caballero ("Munoz"). Yet Republic never questioned Puentes about this discrepancy, and did not even conduct a title search of the property.

The borrower, Thule, was a Panamanian shell corporation whose principal asset was a vacant residence. On this point, we adopt the testimony of Special Agent Truesdale:

> Through my experience and training I have come to learn Panamanian corporations and other offshore corporations are preferred by drug smugglers to conceal their assets, and to also form a base of what appears to be legitimate income.
>
> They usually do this by setting up what I would refer to as shell corporations overseas. In turn, they would set up bank accounts in the United states.
>
> Oftentimes, the accounts in the United States are in the name of trustee or nominee individuals. Once the money is transferred from overseas back into the United States, it is basically clean money or what we refer to as laundered money at that time.
>
> They will oftentimes pay taxes and do all the legalities to make things look legitimate with this money.

Transcript of Trial Testimony, at pages 22-23.

Although Puentes, the guarantor, had an existing relationship with Republic, the borrower did not. Indeed, both Thule and Munoz, Thule's sole shareholder, who agreed to sign as guarantor,

were unknown to Republic. Republic did not assess Munoz' financial standing and did not even meet him until the closing. The loan was sizeable — $800,000 on a $1.2 million dollar residence, interest payments for the first year and a one-year balloon note. Yet the borrow could not demonstrate how the loan was to be repaid. The borrower was not doing business and had no source of income. Because the borrower's financial statements were not audited, a lender would ordinarily require further proof of financial standing. Republic failed to do so, and did not even establish a repayment schedule.

Although the collateral was sufficient to cover the loan, we do not believe that banks are in the business of lending money with the intent to force sale of the property. Moreover, even though the house was for sale, the lender did not secure an undertaking by the borrower to use the proceeds of the sale for repayment of the loan. Nor did the lender ask Thule why a loan was necessary if the property was about to be sold.

The record also establishes that the president of Republic, Fred de la Mata, had an unusually close involvement in this loan transaction. De la Mata and other bank officers personally inspected the property. De la Mata claims that he presented the loan to the board for approval during a break at a convention held at the Sofitel Hotel, but he cannot document this meeting. Moreover, the only documentary evidence shows that the board endorsed the loan subsequent to the closing on the property.

Perhaps the most revealing fact in the record is Puentes' sizeable gift to de la Mata's family. Once the loan was approved, Puentes gave de la Mata's son and his fiance a Caribbean honeymoon package consisting of hotel reservations and two first-class, round-trip tickets to St. Thomas and St. Maarten. The package cost approximately $3,000. The travel agent testified that Iglesias actually booked the trip. Iglesias ordinarily paid in cash. This time, the travel agent was paid by check. The check was signed by Munoz, drawn on the new Republic account.

Finally, we note that after the loan was approved, Republic transferred the loan proceeds to Thule's Swiss bank account, through two cashiers' checks for $350,000 each. This transaction was handled by de la Mata's personal assistant.

Republic claims that many elements of this loan transaction are not unusual for South Florida. We emphasize that it is the totality of the circumstances that underlies our finding of actual knowledge. Moreover, even if the loan was not unusual for South Florida, that does not end the Court's inquiry.[11] The question is not whether this was a commercially sound loan. Rather, the Court must consider whether the lender knew that the property had been acquired with drug proceeds. An unusual loan transaction is merely evidence of the lender's knowledge. In any event, we do not believe that Republic has established commercial reasonableness on this factual record.[12]

At trial, de la Mata conceded that he did not rely on Munoz as guarantor of the loan. Nor do we believe that de la Mata relied on Thule. De la Mata testified again and again that the reason he did not investigate either Thule or Munoz was because he relied on Puentes as a long-standing customer of the bank. De la Mata expected to be paid — not by Thule, or even Munoz, but by Puentes. Yet Puentes had no known connection with either Thule or Munoz. Puentes had no known reason to agree to pay the mortgage.

The only rational conclusion is that Republic knew that Thule, a mere shell corporation, was controlled by Puentes. De la

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[11] The Government's expert testified that the loan was "unusual and unsound." The Court agrees, and we adopt the testimony of the Government's expert. Moreover, even the bank's expert admitted that the loan transaction might be considered unusual outside South Florida.

[12] Miraflores argues that the loan must have been reasonable because another bank had offered Puentes a loan on Miraflores. That lender offered a $750,000 loan at sixteen per cent interest. Beyond those facts, the particular circumstances of that loan are not before the Court. Again, we emphasize that determining the lender's knowledge is a fact-sensitive inquiry. That loan offer may well have been improper. Even so, Republic cannot be absolved by another lender's wrongdoing.

Mata must have known that Thule was a vehicle for Puentes. De la Mata knew that Puentes was trying to unload Miraflores. He did not ask why. Instead, in the face of overwhelming evidence, he chose to look the other way. De la Mata deliberately closed his eyes to what he had every reason to believe was the truth. *See United States v. Alvarez*, 837 F.2d 1024, 1028 (11th Cir. 1988) ("deliberate ignorance"); *United States v. Restrepo-Granda*, 575 F.2d 524, 529 (5th Cir. 1978) ("willful blindness").

Republic argues that to deny its claim would mean that banks must become agents for the Government in investigating prospective customers. We disagree. In *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986), the Second Circuit rejected a similar argument in holding that banks might be subject to forfeiture of bank account assets derived from drug proceeds.[13] The Court stated:

> Appellants contend that a broad application of the forfeiture statute to bank accounts will wreak havoc in the banking industry. They argue that banks will accept deposits at their peril, since investigation of the sources would be costly, time-consuming, and often unilluminating. The risk is vastly overstated. A bank has no duty to investigate the source of customers' deposits. It acts at its peril only when, as a passive receiver of knowledge, it learns that a deposit is derived from drug profits and nevertheless accepts that deposit. The statute imposes no investigatory costs on the banking system.

Banco Cafetero Panama, 797 F.2d at 1162.

Puentes was a reliable source of business. De la Mata wanted to make a profit. The honeymoon gift only sweetened the deal. However, drug proceeds are not a permissible source of business for the financial community. As the Eleventh Circuit has observed, "Those who knowingly do business with drug dealers do so at their own risk. [Claimant's] interpretation of 21 U.S.C. § 881(a)(6) would completely insulate money-launderers, and

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[13] Again, neither party has cited this decision.

others who knowingly do business with drug dealers, from possible forfeiture of their ill-gotten gains." *United States v. Four Million, Two Hundred, Fifty-Five Thousand*, 762 F.2d 895, 905 (11th Cir. 1985).

We recognize that a financial cost may attach to imposition of such a standard, in the sense of missed financial opportunity. However, Congress has determined that the financial community must bear some of the costs, because narcotics inflict a much greater cost on society. We agree with the Second Circuit that Congress did not intend to exempt banks from this mandate.

> Nothing in the terms or legislative history of the forfeiture statute gives the slightest reason to believe that Congress wished to accord banks any special insulation from vulnerability to forfeiture of assets traceable to drug proceeds. On the contrary, Congressional concern with money laundering points in precisely the opposite direction.

United States v. Banco Cafetero Panama, 797 F.2d 1154, 1162 (2d Cir. 1986); *cf. ARCA Airlines, Ltda. v. United States Customs Service*, 726 F.Supp. 827 (S.D.Fla. 1989) (Scott, J.) (For common carriers, "[s]ecurity measures [to detect narcotics] are part of the cost of doing business. We do not find the cost excessive in view of the risk.").

The Court concludes that Republic has failed to meet its burden of showing lack of actual knowledge.[14] On the contrary, every fact in the record points irrefutably to Republic's knowing involvement. These facts, when considered in their totality, suggest actual knowledge, if not complicity, on the part of the lender.[15] Congress has sent a clear message in the recent legisla-

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[14] Thus, like the court in *Four Million, Two Hundred and Fifty-Five Thousand Dollars*, 762 F.2d at 906 n. 24, we need not decide whether the claimant must prove that it did all that reasonably could be expected under the *Calero-Toledo* standard.

[15] In view of these factual findings, it is not necessary for the Court to rule on the credibility of the Government's final witness, Rene J. Leonard. However, if the Court were forced to decide this issue, we would be inclined to reject Leonard's testimony.

tion enacted that it will not permit the financial community to knowingly do business with drug dealers. This opinion merely follows that clear message. We do so with little reluctance.

V. CONCLUSION

Based upon the foregoing, it is hereby ORDERED as follows:

1. The Defendant property is subject to forfeiture.

2. Republic's claim is DENIED.

3. The United States is entitled to final judgment.

4. The United States shall submit a final judgment forthwith in accordance with this opinion.

5. The Court retains jurisdiction to effectuate the terms of this order and to assess costs upon appropriate motion.

DONE and ORDERED.

ADI:tc
final judg/forfeiture

FILED by (initialled) D.C.
MAR 15, 1990
ROBERT M. MARCH
CLERK U.S. DIST. CT.
S.D. OF FLA.-MIAMI

CLOSED
CIVIL
CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0349-CIV-SCOTT

UNITED STATES OF AMERICA

Plaintiff,

v.

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 MIRAFLORES AVENUE, CORAL GABLES, FLORIDA, ALSO KNOWN AS LOT 10, IN BLOCK 14, OF COCOPLUM SECTION 2 PLAT "B", ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 115, AT PAGE 84 OF THE PUBLIC RECORDS OF DATE COUNTY, FLORIDA, TOGETHER WITH ALL BUILDINGS, FIXTURES AND APPURTENANCES THERETO AND ALL IMPROVEMENTS THEREON,

Defendant.

FINAL JUDGMENT OF FORFEITURE

THIS CAUSE came on before this Court upon trial. This Court has issued its memorandum opinion herein. Accordingly, this Court finds as follows:

1. On February 26, 1988, plaintiff filed a Complaint for Forfeiture *In Rem* against the defendant property alleging that the property is forfeit to the United States of America pursuant to 21 U.S.C. §881(a)(6).

2. The defendant property, which includes all improvements, fixtures, and appurtenances thereto or thereon, is more particularly described as:

> Lot 10, in Block 14, of Cocoplum Section 2 Plat "B", according to the Plat thereof, as recorded in Plat Book 115, at Page 84 of the Public Records of Dade County, Florida.

3. On February 26, 1988, in accordance with the above Complaint, a Warrant of Arrest in Rem of the defendant property was issued and duly executed on March 7, 1988.

4. On March 28, 1988, Public Notice of Action and Arrest of the defendant property appeared by publication in the Miami Review and Proof of Publication of Public Notice of Action and Arrest was filed with the Court on April 5, 1988.

5. In addition to Public Notice of Action and Arrest having been completed, plaintiff personally served the following:

> a. Thule Holding Corporation, by and through its registered agent, as record owner of the defendant property on March 2, 1988.
>
> b. Republic National Bank of Miami, a potentially interested party, on March 2, 1988.
>
> c. Indalecio and Margarita Iglesias, potentially interested parties, on March 1, 1988.

d. Additionally, the Florida Department of Environmental Regulation was served via certified mail, return receipt requested. Notice was accepted on March 2, 1988.

6. Republic National Bank and Thule Holding Corporation have filed claims alleging interests in the defendant property.

7. No other parties have filed claims or answers in this matter.

8. A Memorandum Opinion has been entered by this Court denying all interests claimed by Republic National Bank. Thule Holding Corporation consented to forfeiture of its interests on June 9, 1988. On May 31, 1988, this Court entered an order for interlocutory sale. The defendant real property has already been sold pursuant to that order and this final judgment addresses the remaining proceeds of that sale.

9. The time for which other persons may file a claim and answer has expired.

Based on the above findings, and the Court being otherwise fully advised in the premises, it is hereby;

ORDERED AND ADJUDGED:

1. The court finds that plaintiff United States of America has probable cause to forfeit the defendant real property. This Court finds further that plaintiff United States of America had reasonable cause for this seizure pursuant to 28 U.S.C. §2465.

2. Republic National Bank's claim is denied with prejudice.

3. The proceeds of the interlocutory sale of the defendant real property is forfeited to the United States of America pursuant to 21 U.S.C. §881(a)(6), and no right, title, or interest to those proceeds shall exist in any other party.

4. Since the defendant real property has already been sold pursuant to this Court's prior orders, the United States of America is hereby directed to dispose of the remaining proceeds of the interlocutory sale, in accordance with law.

DONE AND ORDERED in Chambers at Miami, Florida, this *15* day of *March*, 1990.

/s/
UNITED STATES DISTRICT JUDGE
THOMAS E. SCOTT

cc: U.S. Marshal (2 certified)
Alan Dagen — AUSA
Stanley Beiley, Esq.

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
AUG 7 1991
MIGUEL J. CORTEZ
CLERK

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-5295

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 Miraflores Avenue, etc.,

Defendant

REPUBLIC NATIONAL BANK OF MIAMI,

Claimant-Appellant,

THULE HOLDING CORP.,

Claimant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF HEARING EN BANC (Opinion *June 10, 1991*, 11th Cir., 19__, _____ F.2d _____).

Before: KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
AUG 26 1991
MIGUEL J. CORTEZ
CLERK

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

For The Eleventh Circuit

No. 90-5295

D.C. Docket No. 88-349-CIV-TES

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 Miraflores Avenue, etc.,

Defendant

REPUBLIC NATIONAL BANK OF MIAMI,

Claimant-Appellant,

THULE HOLDING CORP.,

Claimant.

Appeal from the United States District Court
for the Southern District of Florida

Before: KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the appeal in the above styled and numbered cause be and the same is hereby DISMISSED;

IT IS FURTHER ORDERED that claimant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 10, 1991
For the Court: Miguel J. Cortez,
Clerk

By: /s/ _____
Deputy Clerk

ISSUED AS MANDATE: AUG 26, 1991

Supreme Court, U.S.
FILED
JAN 17 1992
OFFICE OF THE CLERK

No. 91-767

In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction over an appeal from an *in rem* forfeiture proceeding after the *res* was removed from the district.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-767

REPUBLIC NATIONAL BANK OF MIAMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 932 F.2d 1433. The opinion of the district court (Pet. App. A10-A29) is reported at 731 F. Supp. 1563.

JURISDICTION

The judgment of the court of appeals was filed on June 10, 1991. A petition for rehearing was denied on August 7, 1991. Pet. App. A34-A35. The petition for certiorari was filed on October 31, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1988, the United States filed an *in rem* action in the United States District Court for the Southern District of Florida seeking forfeiture of a single-family residence at 6960 Miraflores Avenue in Coral Gables, Florida. The complaint alleged that Indalecio Iglesias was the true owner of the property and that Iglesias had used the proceeds of narcotics trafficking to buy the residence. Pet. App. A11. A warrant to arrest the property was issued, and the United States Marshal seized the property. Pet. App. A31.

In response to the complaint, Thule Holding Corporation, a Panamanian shell corporation, filed a claim stating that it was the owner of the Miraflores Avenue residence. Pet. App. A11. In addition, petitioner filed a claim asserting an $800,000 lien interest in the property pursuant to a mortgage and security interest recorded on September 30, 1987. *Ibid.* Thereafter, Thule Corporation filed a stipulation consenting to forfeiture of its interest. Pet. App. A11, A32. At the government's request, petitioner agreed to an interlocutory sale of the property. The residence was sold for $1,050,000 and the proceeds were retained by the Marshal pending disposition of the case. Pet. App. A11 n.2.

2. The government's forfeiture complaint proceeded to a bench trial. The evidence at trial showed that on December 10, 1981, Iglesias was arrested by the Customs Service on board a Colombian vessel containing 300 pounds of marijuana and that in April 1981, Bahamian officials arrested Iglesias for possession of 3,000 pounds of marijuana and fined him $10,000. Pet. App. A12. In addition, a DEA agent presented information gained from confidential in-

formants that between 1980 and 1985, Iglesias imported 30,000 kilograms of cocaine into the United States from Colombia. An informant estimated that Iglesias made $180 million in profits from these importations. Pet. App. A13.

In 1983, Iglesias, acting through Thule, purchased the lot and the then-partially constructed residence at 6960 Miraflores Avenue. To complete construction of the residence, Iglesias paid a contractor a total of between $200,000 and $220,000 in weekly cash installments of $7,000 to $9,000. A second contractor received approximately $140,000, mostly in cash. Pet. App. A13. After completion of the residence, Iglesias and his family lived there. *Ibid.*

In August 1987, Iglesias learned that the IRS was investigating him and the Miraflores Avenue property. Pet. App. A14. Iglesias immediately put the house up for sale and approached Miami lenders to secure a mortgage on the property. Petitioner agreed to provide an $800,000 one-year "balloon" note on the property, which was appraised at $1.2 million, without asking the purpose of the loan. Petitioner's president was personally involved in the transaction, which was quickly approved outside of petitioner's normal channels. Petitioner did not conduct a title search of the property or investigate Thule, the corporate borrower. When the loan was approved, the residence was vacant. The second guarantor of the loan used its proceeds to buy expensive gifts for petitioner's president's family and to purchase an airplane ticket to Switzerland for Iglesias. Petitioner transferred the proceeds of the loan to Iglesias' Swiss bank account.

Iglesias fled the United States shortly after this transaction. Pet. App. A14, A23.[1]

The district court ordered petitioner's interest in the property forfeited. Pet. App. A10-A29. The court found that probable cause existed to believe that "Iglesias bought the Miraflores property and constructed the residence with drug profits, and then laundered the money through [petitioner's] mortgage into his Swiss bank account." Pet. App. A16. The court held that petitioner was entitled to assert an innocent owner defense to the forfeiture, but that petitioner was not an innocent owner. The court found that the borrower was a Panamanian shell corporation unknown to petitioner whose principal asset was a vacant residence; that the borrower had no business and could not demonstrate how the loan was to be repaid; that petitioner structured the loan in an unusual fashion and did not establish a repayment schedule for the loan; that the bank did not inquire why a loan was necessary if the property was about to be sold; that once the loan was approved, petitioner's president received a $3,000 vacation from the second guarantor of the loan; and that petitioner transferred the proceeds of the loan to a Swiss account. Pet. App. A23-A26.

3. On March 15, 1990, the district court issued a final judgment of forfeiture. Pet. App. A30-A33. Although petitioner filed a timely notice of appeal, it did not file a motion to stay execution of the judgment or post a supersedeas bond. Pet. App. A3. On April 20, 1990, the United States Marshal executed the judgment and transferred the proceeds from the

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[1] During the pendency of the forfeiture action, Iglesias was indicted in the Southern District of Florida on narcotics violations. Pet. App. A2-A3.

sale of the house to the Asset Forfeiture Account of the United States Treasury. *Ibid.*

4. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. A1-A9. Relying on *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988), the court held that removal of the proceeds of the sale from the district destroyed the court's *in rem* jurisdiction. Pet. App. A5. The court observed that "[w]here an appellant fails to file a stay of judgment or a supersedeas bond, and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction." *Ibid.* (quoting *One Lear Jet*, 836 F.2d at 1573). The court also rejected petitioner's argument that *in personam* jurisdiction existed because the government had served petitioner with the complaint of forfeiture. The court held that the action was against the property, and that the government had served petitioner as a courtesy, not because it was required to do so. Pet. App. A6-A7 (citing Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C). Finally, the court held that the government was not estopped from contesting the jurisdiction of the court based on its agreement that the United States Marshal would retain the proceeds of the sale during the pendency of the forfeiture action. Pet. App. A8-A9.

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals erred in dismissing its appeal. In addition, petitioner argues that the decision of the court of appeals conflicts with the decisions of other courts of appeals and that this Court should grant certiorari to resolve the conflict. The decision below is correct. Although the courts of appeals are divided over the question whether the removal of the *res* from the district deprives the court of jurisdiction in an *in rem* action, the practical significance of that conflict is not apparent, given the claimant's ability to seek a stay of the district court's judgment in an appropriate case. In addition, Congress is currently considering the question and may enact legislation that resolves the conflict in the near future. Accordingly, review by this Court would be premature.

1. This Court has recognized that jurisdiction in civil forfeiture proceedings, as in all *in rem* actions, is based on the court's control of the *res*. See, *e.g.*, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-684 (1974); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719-720 (1971); *Pennington* v. *Fourth National Bank*, 243 U.S. 269, 271-272 (1917). It follows that, once a judgment of civil forfeiture has been entered, a claimant must seek a stay of execution, file a supersedeas bond, or take other action to preserve the *res* pending appeal. If the claimant fails to do so, removal of the *res* from the district will deprive the appellate court of jurisdiction to consider an appeal.

Contrary to petitioner's contention, this rule does not work an injustice on claimants or permit the

government to defeat appellate jurisdiction whenever it chooses by removing the *res* from the court's territorial jurisdiction. Like a judgment in any other civil action, a forfeiture judgment is automatically stayed for ten days following its entry. See Fed. R. Civ. P. 62(a). During that time, a losing claimant may file a supersedeas bond that automatically stays the judgment during the pendency of the appeal. See Fed. R. Civ. P. 62(d). Alternatively, since a district court has discretion to dispense with the supersedeas bond requirement, a claimant may file a motion to stay execution of the judgment without requiring a bond. See *Northern Indiana Public Service Co.* v. *Carbon County Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986); *Olympia Equipment Leasing Co.* v. *Western Union Telegraph Co.*, 786 F.2d 794, 796 (7th Cir. 1986); *Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 636 F.2d 755, 757-760 (D.C. Cir. 1980). If the district court refuses to stay its judgment pending appeal, the claimant may seek a stay from the court of appeals. See Fed. R. App. P. 8(a); Fed. R. Civ. P. 62(g). Consequently, the government has no power unilaterally to deprive the court of its jurisdiction. In this case, petitioner neglected even to seek a stay pending appeal. Petitioner's argument is, in reality, a complaint about its own failure to take appropriate steps to preserve its rights on appeal.

Nor is there any merit to petitioner's contention that the government submits itself to the *in personam* jurisdiction of the court whenever it initiates a civil forfeiture proceeding. This was a pure *in rem* proceeding, not a proceeding brought both *in rem* and *in personam*. If petitioner's view were correct, a court would have *in personam* jurisdiction over any

participant in an *in rem* proceeding. That would be inconsistent with the basic concept of an *in rem* action, which bases jurisdiction on the court's control of the *res* because the judgment will be satisfied from the *res*. Subjecting participants in an *in rem* proceeding to *in personam* jurisdiction would mean that jurisdiction would not depend on control of the *res* and that a judgment could be entered against the participants themselves.

2. In *One Lear Jet*, the Eleventh Circuit, sitting en banc, reaffirmed the traditional rule that the court's jurisdiction in an *in rem* action depends on control of the *res*. 836 F.2d at 1573. The court in *One Lear Jet* rejected the claimant's argument that the government, by invoking the power of the court, submitted itself to the *in personam* jurisdiction of the court and thus that the court retained the authority to order the government to produce the *res* or the proceeds from its sale. *Id.* at 1575-1577. The court reiterated that, in an *in rem* action, the *res* is the defendant and the sole basis for jurisdiction. *Ibid.*[2]

At the time of its decision, *One Lear Jet* represented the unanimous view of the courts of appeals. See *United States* v. *$2,490*, 825 F.2d 1419, 1420-1421 (9th Cir. 1987); *United States* v. *One 1979 Rolls-Royce Corniche Convertible*, 770 F.2d 713, 717 (7th Cir. 1985). Since the decision in *One Lear Jet*, the Ninth and Seventh Circuits have adhered to the traditional rule. See *United States* v. *$29,959*, 931 F.2d 549, 551 (9th Cir. 1991); *United States* v. *Ten*

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[2] The Eleventh Circuit recently reaffirmed *One Lear Jet*. See *United States* v. *Four Parcels of Real Property in Greene & Tuscaloosa Counties*, 941 F.2d 1428, 1436 n.18 (1991) (en banc).

Thousand Dollars, 860 F.2d 1511, 1513 (9th Cir. 1988); *United States* v. *Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989). But several courts of appeals have declined to follow *One Lear Jet* and have rejected the traditional jurisdictional rule.

In *United States* v. *Aiello*, 912 F.2d 4 (2d Cir. 1990), cert. denied, 111 S. Ct. 757 (1991), the court held that, by bringing a forfeiture complaint, the government submitted itself to the *in personam* jurisdiction of the court. 912 F.2d at 7. In addition, the court rejected the government's argument that the Appropriations Clause of the Constitution prohibits a court from ordering the government to return forfeited funds deposited into the Treasury. *Ibid.* In *United States* v. *$95,945.18*, 913 F.2d 1106, 1109 (4th Cir. 1990), the court held that "by initiating the forfeiture proceeding in the district court, the government has subjected itself to th[e] court's *in personam* jurisdiction." And in *United States* v. *One Lot of $25,721.00 in Currency*, 938 F.2d 1417, 1419 (1st Cir. 1991), the court held that "the time has come to jettison the 'no *res*, no jurisdiction' rule." The court described the rule as "an admiralty fiction" that "is particularly inapposite to a currency forfeiture case." *Id.* at 1420.[3] In short, there is a conflict between the First, Second, and Fourth Circuits on the one hand and the Seventh, Ninth, and Eleventh Circuits on the other.

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[3] In *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991), the court declined to apply the rule that the departure of the *res* from the jurisdiction of the court deprives the court of jurisdiction when the *res* is money. The court reasoned that when cash is forfeited to the United States, the *res* is simply a potential obligation of the United States that is present everywhere in the United States.

3. Congress currently is considering legislation that would resolve this conflict. On November 21, 1991, the Senate passed S. 543, 102d Cong., 1st Sess., which provides, in part:

> In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the appealing party to post an appeal bond.

See 137 Cong. Rec. S17,482 (daily ed. Nov. 21, 1991); see also *id.* at S16,643 (daily ed Nov. 13, 1991) (explaining S. 543). The proposed legislation would overturn the traditional rule requiring possession of the *res* to maintain jurisdiction in the district court and the court of appeals. Under the proposed statute, the transfer of the *res* out of the territorial jurisdiction of the court would not deprive the court of jurisdiction.

Although the House of Representatives failed to pass this legislation before Congress adjourned in 1991, it is currently pending in identical form as part of S. 1665, 102d Cong., 1st Sess., and may be enacted in 1992. At the present time, therefore, consideration of the question by this Court would be premature.

A legislative resolution of this issue is particularly appropriate because a judgment for the petitioner in this case would require a payment of funds from the Treasury without appropriation by Congress. That

result would violate the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7. See *United States* v. *$57,480.05*, 722 F.2d 1457, 1459 (9th Cir. 1984) (citing authorities).

Finally, further review is not warranted because petitioner neglected to seek a stay pending appeal from the district court or the court of appeals. As noted above (p. 7, *supra*), district courts and courts of appeals have discretion to enter a stay pending appeal even if the claimant does not post a supersedeas bond. Because it is not apparent that courts will often deny such stays, the conflict among the courts of appeals may be of limited practical significance. In any event, petitioner's failure to take the minimal steps necessary to seek a stay pending appeal undermines its claim to discretionary review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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No. 91-767

In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

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REPUBLIC NATIONAL BANK OF MIAMI,

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ARGUMENT

The Government's Brief in Opposition admits that there is a clear, recurring and irreconcilable conflict among the circuits on the issue of whether the Government's removal of the res from the district in a civil forfeiture case divests a court of jurisdiction unless a bond is posted or a stay pending appeal is ordered. Our

Petition cites eight 1991 appellate decisions addressing this issue.[1] With the dramatic increase in the number of civil forfeiture cases filed by the Government, this issue can be expected to recur with even greater frequency.

The Government takes inconsistent positions in its Brief on this issue. First, the Government refers to a rider attached to a Senate bill (subsequently dropped from the legislation) which would preserve appellate jurisdiction in forfeiture cases where the Government removes the property pending appeal. Second, the Government argues that the opinion of the Eleventh Circuit in this case was correct. On the one hand, it urges this Court not to resolve an admittedly irreconcilable conflict among the circuits on an important issue of appellate jurisdiction because legislation may pass and resolve the conflict. On the other hand, it has consistently urged in the circuit courts and now in this Court that the possible legislation is wrong and can be expected to oppose it. This is disingenuous at best.

This Court should resolve the issue presented. Congress has not resolved it and the Government's prediction that it might is pure speculation. A bill was introduced by Senator D'Amato on August 2, 1991, S.1665 102d Cong., 1st Sess., as to which no hearings were held and no action was taken. Cong. Rec. S-12,235-36. Senator D'Amato then offered the same bill as one of a large number of riders to S.543, the "Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991". Cong. Rec. S-16640. Many of the riders, including this one, were passed by the Senate on November 21, 1991. However, the riders were eliminated in Conference Committee on November 27, 1991. The resulting legislation, the "FDIC Improvement Act of 1991" was signed into law on December 19, 1991, without this rider. P.L.

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[1] Further illustrating how often this issue has arisen is that from 1984 to 1991, the Ninth Circuit alone issued seven published opinions on it: *United States v. $29,959 in United States Currency*, 931 F.2d 549 (9th Cir. 1991); *United States v. $84,740 in United States Currency*, 900 F.2d 1402 (9th Cir. 1990); *United States v. $10,000 in United States Currency*, 860 F.2d 1511 (9th Cir. 1988); *United States v. $2,490 in United States Currency*, 825 F.2d 1419 (9th Cir. 1987); *United States v. 66 Pieces of Jade and Gold Jewelry*, 760 F.2d 970 (9th Cir. 1985); *United States v. United States Currency in the Amount of $110,000*, 735 F.2d 326 (9th Cir. 1984); *United States v. $57,480.05 in United States Currency*, 722 F.2d 1457 (9th Cir. 1984).

102-242, 105 Stat. 2236. Congress adjourned without taking any action on S.1665.

The Government suggests, on this record, that consideration of the Petition is "premature." The Government's position is that at some uncertain future time, S.1665 might be referred to Committee, be voted favorably out of Committee, pass the full Senate, survive a conference and become law. There is no reason to have confidence in that prediction. Whether that will happen is pure guesswork. Congress can always pass laws on most of the issues that are presently pending before the federal courts.[2] It is, however, not appropriate for the courts to decline to take jurisdiction over a case because of speculation of possible future congressional action. It is especially inappropriate in this case to decline jurisdiction where the issue presented relates to a judge made rule of appellate jurisdiction.

The Government argues that the Petition should be denied because the Petitioner should have obtained a stay pending appeal. This is, of course, an inappropriate argument on the merits, rather than on this Court's certiorari jurisdiction. It is an argument squarely rejected by four of the Circuit Courts of Appeal (Petition at pages 7-10). It is also an unrealistic argument, for it presupposes that the district courts will routinely enter a stay in the ten days between the time a final judgment is entered and the automatic stay provided in Rule 62(a), Fed.R.Civ.P. expires,[3] or that the courts of appeal will routinely act quickly and favorably on emergency petitions for review of district court rulings denying stay relief. Even if the Government's suppositions were accurate, the Brief in Opposition supports a "rule" which: (a) requires emergency action by overburdened federal trial and appellate courts; (b) effectively alters the time to appeal a forfeiture judgment; and (c) most importantly, makes appeals

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[2] Whatever action Congress may take in the future to correct the result below will be of no assistance to this litigant, whose only recourse is to this Court.

[3] *But see, Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983), in which the trial court ordered disbursement of the funds from the court registry and denied an emergency motion to prevent disbursement pending an appeal of an *in rem* judgment. The funds were disbursed, and the Eleventh Circuit dismissed the appeal for lack of jurisdiction.

from forfeiture judgments dependent on discretionary district court rulings.[4]

The other "merits" argument asserted by the Government is its lengthy and irrelevant statement of the facts as found by the district court on the innocent owner defense. The Brief in Opposition neglects to state that on appeal, Petitioner challenged as clearly erroneous many of these "facts", and also urged reversal because the district court applied the wrong legal standard. Because the Eleventh Circuit dismissed the appeal, these issues were never addressed. Should this Court grant the Petition and reinstate the appeal, the Eleventh Circuit will have the opportunity to consider the merits of these issues for the first time.

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[4] Rule 4(a), Fed.R.App.P. provides that one may take an appeal within 30 days of the entry of a final judgment. In a forfeiture case, the Eleventh Circuit ruling requires the appellant to obtain a stay or post a bond no later than 10 days after entry of judgment, or the Government can effectively prevent an appeal from being taken by removing the res. Even if a stay is sought within ten days, the Government may unilaterally act to prevent an appeal if the district court does not act in time. The appellate rights of parties who cannot afford to post a bond are left to the discretion of the district and appellate courts on whether to grant a stay. These are but a few of the consequences of the "rule" the Government has assured this Court is correct.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, this Court should grant the petition for writ of certiorari, vacate the judgment below, and order the Eleventh Circuit to reinstate Republic's appeal.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 31, 1991
CERTIORARI GRANTED FEBRUARY 24, 1992

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

Plaintiff.

v. CASE NO. 88-0349-CN-TES

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 MIRAFLORES AVE., CORAL GABLES, FL., ALSO KNOWN AS LOT 10, IN BLOCK 14 OF COCOPLUM SEC., 2, PLAT "B" ACCORDING TO THE PLAT THEREOF, ETC.,

Date	Nr.	Proceeding
February 26	1	Complaint for forfeiture in rem.
March 8	8	Answer & Affirm. Defenses by Claimant Republic National Bank of Miami
March 9	9	Verified Claim by Republic
February 21	72	Memo Opinion(TES-2/21/90)1. The deft property is subject to forf. 2. DENYING Republic's claim. 3. THE U.S. is entitled to f/jmt. 4. The U.S. shall sub a f/judmt forthwith accord w/opinion. 5. The court retains juris to effectuate the terms of this order & to assess costs upon appropriate mot. (EOD-2/26/90-CCAP).

Date	Nr.	Proceeding
March 15	73	FINAL JUDGMENT OF FORF(TES-3/15/90) 1. THAT court finds the plft USA has probable cause to forf deft Real property. 2. DENYING Republic National Bank's claim w/prej. 3. The proceed's [sic] of the interlocutory sale of the deft real property is forf to the USA. 4. USA is hereby directed to dispose of the remaining proceed's [sic] of the interlocutory sale. (EOD-3/20//90-CCAP).
March 28	74	NOTICE OF APPEAL by Claimant Republic from F/J entered 3/15/90, & Memo Opinion entered 2/21/90. (Copies to USCA & Attys of record) (FEE PAID) #102495).

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 90-5295

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

ONE SINGLE FAMILY RESIDENCE
LOCATED AT 6960 MIRAFLORES
AVENUE, ETC.,

Defendant,

REPUBLIC NATIONAL BANK OF MIAMI,

Claimant-Appellant,

THULE HOLDING CORP.,

Claimant.

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1. RECORDS, EXHIBITS AND BRIEF INFORMATION

FILED

9/4/90	Brief for Appellant
9/4/90	Record Excerpts
11/6/90	Brief for Appellee
11/29/90	Reply Brief for Appellant

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7. REHEARING INFORMATION

7/1/91	Petition for Rehearing ☒ Appellant ☐ Appellee ☒ Reg. ☒ In Banc
8/7/91	Order Denying Rehearing

8. MOTIONS

Filing Motion to or for:		Response Filed by:	Date
6/4/90	Dismiss by Appellee	Appellant	6/27/90
		Carried with case	8/13/90

10. JUDGMENT OR MANDATE INFORMATION

6/10/91	Flg & entg. Judgment
8/26/91	Jdgt. as Mdt. Issd. to Clerk

11. SUPREME COURT INFORMATION NO. 91-767

11/19/91	Notice of Flg. of Cert. Pet. on 10/31/91		
3/2/92	Order of S.Ct.	☐ Denied ☒ Granted	2/24/92

UNITED STATES of America, Plaintiff,

v.

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 MIRAFLORES AVENUE, CORAL GABLES, FLORIDA. Also Known As Lot 10, in Block 14, of Cocoplum Section 2 Plat "B", According to the Plat Thereof, as Recorded in Plat Book 115, at Page 84 of the Public Records of Dade County, Florida, Together With All Buildings, Fixtures and Appurtenances Thereto and All Improvements Thereon, Defendant.

No. 88-0349-CIV.

United States District Court,
S.D. Florida.

Feb. 21, 1990.

Stanley Beiley, Miami, Fla., for defendant Republic Nat. Bank.

Alan Dagen, Asst. U.S. Atty., Miami, Fla., for U.S.

MEMORANDUM OPINION

SCOTT, District Judge.

This controversy presents serious issues involving the civil forfeiture law, 21 U.S. C. § 881, and its impact upon lending institutions. It brings into play the duties and obligations of a commercial lending institution when unmistakable "red flags" have been raised as to the involvement of drug-related proceeds in a financial transaction. Concomitantly, it presents to the Court the duty to define the standard of conduct for lending institutions in such cases. We venture forward fully cognizant of this opinion's precedent-setting nature.

I. HISTORY OF THE CASE

The United States brings this *in rem* action[1] for forfeiture of real property located at 6960 Miraflores Avenue, Coral Gables, Florida.[2] The Government alleges that Indalecio Iglesias was the true owner of the property and that he has engaged in a continuing series of narcotics-related transactions in violation of 21 U.S.C. §§ 841(a)(1) and 846, resulting in over 100 million dollars in illegal proceeds. The Government further alleges that Iglesias used these illegal proceeds to purchase the defendant real property.

Thule Holding Corporation ("Thule"), a Panamanian corporation, filed its claim and answer as the record owner of the property. Initially, Thule alleged that it had no knowledge of any illegal activities related to the real property. However, shortly before trial, Thule executed a stipulation of settlement and consent to forfeiture.

Republic National Bank of Miami ("Republic") filed its claim and answer asserting an $800,000.00 lien interest in the real property pursuant to a mortgage and security agreement recorded September 30, 1987. The issues between Republic and the Government were tried to the Court on June 27 and 28, 1988. The questions litigated included probably cause, relation back and innocent ownership.

Following submission of the case, the Government moved to reopen the evidence, claiming that a previously undisclosed witness had critical evidence. After initially opposing the motion, Republic withdrew its opposition, provided that it could offer appropriate rebuttal evidence. That request was honored.

In October 1988, the trial resumed with the Government's witness, Rene J. Leonard, followed by a number of Republic's

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[1] The Court has jurisdiction pursuant to 28 U.S.C. §§1355 and 2461.

[2] Pursuant to stipulation between the parties, with Court approval, the property was sold for $1,050,000 on June 1, 1988. The funds are being held by the United States Marshal pending disposition of this case.

witnesses attacking Leonard's credibility and, thereafter, the Government's efforts to bolster his credibility. In light of the issues involved, the parties were provided ample opportunities to brief the multiple issues and they responded accordingly. Those memoranda have been quite helpful and counsel are commended. Our findings of fact and conclusions of law follow.[3]

II. PROBABLE CAUSE

A. Factual Background

1. Iglesias' Drug-Trafficking Activities

The Government called Drug Enforcement Administration ("DEA") Special Agent Lee Truesdale to establish probable cause.[4] Truesdale testified about his investigation of Indalecio "Andy" Iglesias, based on intelligence gathered through conversations with the Federal Bureau of Investigation ("FBI"), Internal Revenue Service ("IRS") and Customs Service ("Customs").[5]

Special Agent Truesdale testified that, on December 10, 1980, Iglesias was arrested on board a vessel stopped by Customs in which 300 pounds of marijuana were found in a sealed compartment. In April 1981, Iglesias was arrested for possession of 3,000 pounds of marijuana and fined $10,000.00 by Bahamian officials.

Truesdale also offered evidence obtained through "reliable" confidential informants. These informants possessed first-hand

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[3] Fed.R.Civ.P. 52(a); *see Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

[4] The government bears the initial burden of establishing probable cause to believe that the property is derived from illegal drug activities. Once the government has established probably cause, the burden shifts to the claimant, either to rebut the government's evidence or to prove innocent ownership. *United States v. A Single Family Residence*, 803 F.2d 625, (11th Cir.1986).

[5] In a forfeiture proceeding, the government may offer hearsay evidence to establish probable cause. *United States v. A Single Family Residence*, 803 F.2d 625, 629 n. 2 (11th Cir. 1986).

knowledge of Iglesias's drug importation activities. The informants were involved in smuggling both marijuana and cocaine with Iglesias.

Through an informant, Iglesias began to import cocaine from Colombia into the United States. The informant estimated that Iglesias transported approximately 30,000 kilograms of cocaine between 1980 and 1985. Based upon his knowledge, the informant estimated that Iglesias earned 180 million dollars in drug profits between 1980 and 1985. This estimate was based upon Iglesias' charge per kilo ($6,000 to $9,000) for transportation multiplied by the number of kilos (30,000) transported over the five-year period. Iglesias had no legitimate source of income for this time period.

2. Iglesias' Acquisition of Miraflores

During this period between 1980 and 1985, while Iglesias was importing narcotics from Colombia, he was also purchasing expensive property in South Florida. The defendant property located at 6960 Miraflores Avenue, Coral Gables, Florida, was one such property.

In 1983, acting through Thule, a shell corporation, Iglesias purchased the Miraflores lot and partially-constructed residence. Between 1983 and 1984, through a series of agents and contractors, Iglesias continued construction on the Miraflores property. Iglesias and his wife were present at the site and supervised construction of the residence. Iglesias paid one contract between $200,000 and $220,000 across this time period. This contractor was paid $7,000 to $9,000 every week or two weeks, in cash, carried in a briefcase. A second contractor was paid approximately $140,000. About 60% of these payments were in cash. After the house was constructed, Iglesias and his family were the only persons ever to reside at Miraflores.

3. Republic's Mortgage Interest

In August 1987, IRS agents contacted Inocente Hernandez concerning Iglesias. Shortly thereafter, Iglesias called Hernandez to find out whether the IRS had contacted him. Hernandez told Iglesias that the IRS had called to ask questions about Iglesias and the property at Miraflores. Alerted to the investigation, Iglesias immediately began his efforts to recoup his financial investment before possible Government action. Iglesias put the house up for sale and approached Miami lenders to secure a mortgage on the property.

Republic agreed to provide an $800,000 one-year balloon note on the property, which was appraised at $1.2 million. Once the loan was approved, Republic transferred the proceeds to the borrower's Swiss bank account. Iglesias had recently purchased an airplane ticket to Geneva. He has apparently fled the jurisdiction of the United States.

B. Legal Analysis

Republic contends that the Government has failed to show any nexus between the property seized and a particular drug deal. However, Republic "misunderstands the government's burden. The government need not trace the cash to specific transactions, or actually prove by a preponderance of evidence a substantial connection to drug dealing." *United States v. $41,305.00 in Currency and Traveler's Checks*, 802 F.2d 1339, 1343 (11th Cir. 1986). (citation omitted).

The Eleventh Circuit has recently stated the test as follows:

> In demonstrating a substantial connection between the property and illegal drug transactions, the government is not required to show a relationship between the property and a specific drug transaction. The government's burden of demonstrating probable cause is less than prima facie proof but more than mere suspicion.

United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, 893 F.2d 1245 (11th Cir. 1990).[6] In addition, probable cause may be based "wholly on circumstantial evidence, and that evidence may include facts learned after the actual seizure of the money." *$41,305.00,* 802 F.2d at 1343. Applying these principles, the Court makes the following factual findings on the issue of probably cause:

1. The Miraflores lot, with the residence, was worth $1.2 million dollars.

2. Iglesias purchased the Miraflores property through Thule. Thule was a straw owner for Iglesias.

3. Iglesias paid a series of agents and contractors to build a luxury home on the Miraflores lot. The contractors were paid large sums of money, primarily in cash, in payments under $10,000, to avoid the currency reporting laws.

4. Iglesias and his wife were present at the site and supervised construction of the property. Iglesias and his family are the only persons who ever resided at the property.

5. Iglesias is a known drug-trafficker. He has previously been arrested and convicted on narcotics charges.

6. The Court accepts Special Agent Truesdale's testimony that Iglesias earned 180 million dollars from the illegal importation of narcotics during the relevant time-frame. Truesdale's testimony was based on his own investigation, statements of other investigating agents, and statements of a reliable confidential informant. The informant's statements were, in turn, corroborated by the statements of other informants with personal knowledge.

7. Iglesias had no legitimate source of income during this time.

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[6] The "substantial connection" requirement is not found in the statute, but rather in the legislative history. *Four Million, Two Hundred and Fifty-Five Thousand Dollars,* 762 F.2d at 902 n. 14.

8. Iglesias knew that he was under investigation by the IRS, and that the Miraflores property was part of this investigation.

9. As soon as Iglesias became aware of the investigation, he put the house up for sale, secured an $800,000 mortgage loan on the property, and sent the money to a Swiss bank account.

The Court finds that probable cause exists to believe that Iglesias bought the Miraflores property and constructed the residence with drug profits, and then laundered the money through the Republic mortgage into his Swiss bank account. We have judged the facts "not with a clinical detachment, but with a common sense view to the realities of normal life." *Wilson v. Attaway*, 757 F.2d 1227, 1235 (11th Cir. 1985). Under this standard, we have also taken "into account, as a 'common experience consideration,' the fact that Miami has become a known center for drug-smuggling and money-laundering." *Four Million, Two Hundred and Fifty-Five Thousand Dollars*, 762 F.2d at 904; *United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884, 888 n. 4 (11th Cir. 1989). Considering the "totality of the circumstances," *Four Parcels of Real Property*, 893 F.2d 1245, we conclude that the Government has met its burden of showing probable cause to forfeit the property.

III. RELATION BACK

Having established the probable cause requirement, the Government contends that Republic's claim must fail as a matter of law under the relation back doctrine. Under this doctrine, the interest of the United States vests in the property upon commission of the offense giving rise to the forfeiture. 21 U.S.C. § 881(h) (1984 amendment codifying relation back doctrine). A final judgment of forfeiture merely confirms the government's interest and therefore relates back to the time of the offense. Thus, the Government argues that Republic, as a subsequent purchaser, could not have acquired any interest in the property.

The genesis of the Government's position is *United States v. Stowell*, 133 U.S. 1, 10 S.Ct. 244, 33 L.Ed. 555 (1889), decided

over one hundred years ago. In *Stowell,* 133 U.S. at 16-17, 10 S.Ct. at 247, the Supreme Court stated that forfeiture of property to the United States relates back to the time of the offense and "avoids all intermediate sales and alienations, even to purchasers in good faith." The forfeiture statute in *Stowell* applied to property owned by a person who "knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same." *Stowell,* 133 U.S. at 2 n. 1, 10 S.Ct. at 244 n. 1 Thus, the Supreme Court in *Stowell* merely held that "an exception for innocent holders did not prevent forfeiture from relating back in the case of holders who did not qualify for the exception." *Eggleston v. State of Colorado,* 873 F.2d 242, 247 (10th Cir. 1989).

Since *Stowell* was decided, Congress has provided an innocent owner exception to most forfeiture statutes, including the civil forfeiture statute, 21 U.S.C. § 881. The innocent owner exception protects "the interest of an owner" who proves that the offense was committed without its "knowledge or consent." 21 U.S.C. § 881(a)(7). The Government contends, however, that the innocent owner provision only applies to claimants who owned the property at the time of the offense, and not to those who acquired the property afterward. To test the validity of this contention, the Court must review the language and legislative history of the innocent owner provision, 21 U.S.C. § 881(a)(7).

A. Legislative History

Section 881(a)(7) provides that "no property shall be forfeited ... to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." The issue is whether the tern "owner" includes a claimant who acquired an interest in the property subsequent to the offense leading to forfeiture. The plain meaning of the language employed by Congress is the "primary, and ordinarily the most reliable" source of legislative intent. *Public Citizen v. United States Department of Justice,* _____ U.S. _____, 109 S.Ct. 2558, 105

L.Ed.2d 377 (1989). In this case, however, the meaning of the statute is not clear. Moreover, because "statutes always have some purpose," *id.*, a review of the legislative history can only assist the Court in divining Congressional intent.

Congress enacted the innocent owner exception "in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction." Congressional Record-Senate, July 27, 1978, p. S23056 (remarks of Senator Culver). Congress intended "to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur." *Id.* at S23057 (remarks of Senator Nunn).

Thus, Congress believed that the innocent owner exception would protect bona fide purchasers who acquired ownership of the property subsequent to the offense giving rise to the forfeiture. The Government's position to the contrary is simply not supported by the legislative history of the statute.

B. Case Law

The Eleventh Circuit has not had the opportunity to decide whether the relation back doctrine prevents a bona fide purchaser from acquiring an interest in the property subsequent to the offense. Because the Court of Appeals has never denied the claim of a subsequent bona fide purchaser, the applicability of the innocent owner provision remains an open question.

The Government relies on *United States v. $41,305.00 in Currency and Traveler's Checks*, 802 F.2d 1339, 1346 (11th Cir. 1986). However, the court in *$41,305.00* did not reach the issue. Instead, the court merely expressed its doubt that intervention in a forfeiture proceeding could be premised on an interest acquired after the offense. The court stated in dicta: "Illegal use immediately vests title to the property in the sovereign, and cuts off the rights of third parties to obtain legally protectable interests in the property." Because *$41,305.00* was decided on a motion to

intervene, the claimant apparently did not raise the innocent owner exception and the court had no reason to consider the legislative history of that provision. Therefore, in our view, *$41,305.00* is not dispositive of the issue. *See United States v. One Single Family Residence,* 683 F.Supp. 783, 786-87 n. 1 (S.D.Fla. 1988) (Aronovitz, J.) (finding that *$41,305.00* left the issue open for another day).[7]

The remaining cases relied upon by the Government are inapposite. The forfeiture statutes at issue in *Florida Dealers and Growers Bank v. United States,* 279 F.2d 673 (5th Cir. 1960), and *Wingo v. United States,* 266 F.2d 421 (5th Cir. 1959) did not provide an exception for innocent owners.[8] Similarly, in *United States v. Four Parcels of Real Property at Lake Forrest Circle,* 870 F.2d 586 (11th Cir. 1989), and *United States v. One 1967 ChrisCraft 27 Foot Fiber Glass Boat,* 423 F.2d 1293 (5th Cir. 1970), the claimants could not demonstrate innocent ownership and therefore the court did not consider the issue.

As to *United States v. One Piece of Real Estate,* 571 F.Supp. 723 (W.D.Tex. 1983), that court only held that lienholders were not entitled to interest or other charges accruing after the date of the seizure. The court did not hold that the lienholders' interests ended as of the date of the offense. *See also United States v. All That Tract and Parcel of Land,* 602 F.Supp. 307, 313 n. 11 (N.D.Ga. 1985) (rejecting *One Piece of Real Estate).*

At least two courts have held that the innocent owner exception applies to bona fide purchasers, notwithstanding the relation back doctrine. In *Eggleston v. State of Colorado,* 873 F.2d 242, 247 (10th Cir. 1989), the Tenth Circuit held: "Forfeiture therefore cuts off the rights of subsequent lienholders or purchasers, subject to the so-called innocent owners exception in

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[7] The Eleventh Circuit has ordinarily considered the issues together. *See, e.g., United States v. Four Parcels of Real Property on Lake Forest Circle,* 870 F.2d 586, 593-94 (11th Cir.1989) (denying claimant relief because the forfeiture related back *and* the claimant could not prove innocent ownership).

[8] Moreover, the court in *Florida Dealers* remanded for a determination of whether remission or mitigation should be allowed.

section 881(a)(6)." In *United States v. One Single Family Residence*, 683 F.Supp. 783 (S.D.Fla. 1988) (Aronovitz, J.), another court in this district reached the same result. In addition to the legislative history, that court relied on section 881(a)(6), which governs proceeds and therefore contemplates third party recipients. The court also relied in part on the criminal forfeiture statute, which expressly protects bona fide purchasers. *See also United States v. One Parcel of Real Estate*, 715 F.Supp. 360, 363 (S.D.Fla. 1989) (Gonzalez, J.) (Congress did not intend "to place all land titles in doubt because of the 'relation back'" doctrine).

Indeed, more recently, the Supreme Court has suggested that a contrary result would be unconstitutional. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90, 94 S.Ct. 2080, 2094-95, 40 L.Ed.2d 452 (1974), the Court stated:

> [I]t would be difficult to reject the constitutional claim of an owner whose property had been taken from him without his privity or consent.... Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

It is therefore imperative that we give effect to the legislative history of the innocent owner provision, in keeping with our duty "to avoid deciding difficult constitutional questions where the text fairly admits of a less problematic construction." *Public Citizen v. United States Department of Justice*, _____ U.S. _____, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). If the interest of an innocent owner is protected from forfeiture, *a fortiori*, the interest of a bona fide purchaser is also protected. For these reasons, the Court concludes that a bond fide purchaser is entitled to the

protection of the innocent owner exception to the civil forfeiture statute, 21 U.S.C. § 881(a)(7).[9]

IV. INNOCENT OWNERSHIP

Having determined that Republic may assert the innocent owner provision, the Court must now consider whether Republic has met the standard of innocent ownership. To meet the requirements of this provision, the claimant must establish that the offense was committed without its "knowledge or consent." 21 U.S.C. § 881(a)(7). Republic argues that this standard contemplates actual knowledge by the claimant. The Government argues, however, that the claimant must establish that it (1) lacked actual knowledge; (2) lacked constructive knowledge; and (3) did all that reasonably could be expected to prevent the offense. For this third element, the Government cites *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689, 94 S.Ct. 2080, 2094, 40 L.Ed.2d 452 (1974), in which the Supreme Court stated that it might be difficult to reject the due process claim of a person who "had done all that reasonably could be expected to prevent the proscribed use of his property." The forfeiture statute at issue in *Calero-Toledo* did not provide an exception for innocent owners.

The Court notes that the Eleventh Circuit has made conflicting statements about the standard to be applied under the innocent owner provision of the civil forfeiture statute. In *United States v. Four Million, Two Hundred and Fifty-Five Thousand Dollars*, 762 F.2d 895, 906 (11th Cir. 1985), the Eleventh Circuit agreed with the claimant "that the application of the statutory 'innocent owner' defense turns on the claimant's actual knowledge, not constructive knowledge." However, in a footnote, the

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[9] To the extent that *United States v. Walker*, 889 F.2d 1317 (4th Cir. 1989) is to the contrary, we decline to follow it. *Walker* did not concern the precise issue before us. Instead, the court in *Walker* held that the relation back doctrine prevented heirs from acquiring an interest [in] [sic] property subject to forfeiture. Moreover, the court did not even consider the legislative history of the innocent owner provision. For these reasons, we do not find *Walker* persuasive on the issue before us.

court left "for another day the question of the *Calero-Toledo* dicta to forfeiture actions under 21 U.S.C. § 881(a)(6)." *Id.* at 906 n. 24. More recently, the Eleventh Circuit has incorporated the *Calero-Toledo* language into the standard for innocent ownership: "To prevail on a defense of innocent ownership, a claimant must prove not only that it was uninvolved in and unaware of the activity upon which forfeiture is sought, but also that it did everything that reasonably could be expected of it to prevent the activity." *United States v. One 1980 Bertram 58' Motor Yacht,* 876 F.2d 884, 888-89 (11th Cir. 1989).

Republic contends that the record does not demonstrate actual knowledge or consent to the purchase and construction of Miraflores with drug proceeds, or the laundering of money through the Republic loan. This "argument ignores the statutory requirement that the claimant, and not the government, bears the burden of proof on the 'innocent owner' defense. Under 21 U.S.C. § 881(a)(6), the government need not prove, and the district court need not find, that the claimant *had* actual knowledge. Rather, it is the claimant's responsibility to prove the *absence* of actual knowledge." *United States v. Four Million, Two Hundred and Fifty-Five Thousand Dollars,* 762 F.2d 895, 906-07 (11th Cir. 1985).

The Court has found only one reported decision assessing the standard to be applied to a commercial lending institution under the innocent owner provision. In *United States v. A Fee Simple Parcel of Real Property,* 650 F.Supp. 1534 (E.D.La. 1987),[10] the court held that the bank had established innocent ownership on the facts presented because (1) the borrower had a long-standing relationship with the bank; (2) the bank was not aware of any legal problems of the borrower; (3) the bank conducted a title search on the defendant property to ensure that the borrower was the true owner; and (4) even though the bank failed to obtain a financial statement from the borrower, the property was fully secured by collateral.

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[10] The Court is surprised that neither party brought this case to our attention, even though it was decided before this action was filed.

The conduct of the lender in *A Fee Simple* provides a study in contrast with the Miraflores transaction. The Court has distilled the trial record and we make the following factual findings on the issue of Republic's state of knowledge:

1. Thule, the borrower, is a Panamanian shell corporation;
2. The borrower's primary asset is a residence;
3. The residence was vacant at the time;
4. The borrower was about to sell its primary asset;
5. The lender did not ask the purpose of the loan;
6. The lender failed to conduct a title search;
7. The corporate borrower and Antonio Munoz Caballero ("Munoz"), the sole stockholder and a guarantor on the mortgage, were unknown to the lender;
8. Ramon Puentes, the second guarantor, had no known connection with the borrower;
9. Puentes made inconsistent statements of ownership.
10. The lender offered an $800,000 one-year balloon note on property valued at $1.2 million;
11. The borrower had no known source of repayment;
12. Fred de la Mata, president of Republic, was intimately involved in the transaction;
13. The lender quickly approved the loan outside normal channels;
14. The lender cannot document board approval of the loan, although documents indicate the board endorsed the loan after the closing;
15. Puentes, the guarantor, used part of the loan proceeds to buy expensive gifts for the bank president's family, and to buy an airplane ticket to Geneva for Iglesias;

16. The lender transferred the proceeds of the loan to the borrower's Swiss bank account.

There can be no question that the circumstances surrounding approval of the loan were suspicious. Republic was approached by Ramon Puentes, who claimed that he and a "partner" owned the property. However, documents reviewed by the lender show that Thule was the sole owner of the property, and that Thule's stock was, in turn, wholly owned by Antonio Munoz Caballero ("Munoz"). Yet Republic never questioned Puentes about this discrepancy, and did not even conduct a title search of the property.

The borrower, Thule, was a Panamanian shell corporation whose principal asset was a vacant residence. On this point, we adopt the testimony of Special Agent Truesdale:

> Through my experience and training I have come to learn Panamanian corporations and other offshore corporations are preferred by drug smugglers to conceal their assets, and to also form a base of what appears to be legitimate income.
>
> They usually do this by setting up what I would refer to as shell corporations overseas. In turn, they would set up bank accounts in the United states.
>
> Oftentimes, the accounts in the United States are in the name of trustee or nominee individuals. Once the money is transferred from overseas back into the United States, it is basically clean money or what we refer to as laundered money at that time.
>
> They will oftentimes pay taxes and do all the legalities to make things look legitimate with this money.

Transcript of Trial Testimony, at pages 22-23.

Although Puentes, the guarantor, had an existing relationship with Republic, the borrower did not. Indeed, both Thule and Munoz, Thule's sole shareholder, who agreed to sign as guarantor,

were unknown to Republic. Republic did not assess Munoz' financial standing and did not even meet him until the closing. The loan was sizeable — $800,000 on a $1.2 million dollar residence, interest payments for the first year and a one-year balloon note. Yet the borrow could not demonstrate how the loan was to be repaid. The borrower was not doing business and had no source of income. Because the borrower's financial statements were not audited, a lender would ordinarily require further proof of financial standing. Republic failed to do so, and did not even establish a repayment schedule.

Although the collateral was sufficient to cover the loan, we do not believe that banks are in the business of lending money with the intent to force sale of the property. Moreover, even though the house was for sale, the lender did not secure an undertaking by the borrower to use the proceeds of the sale for repayment of the loan. Nor did the lender ask Thule why a loan was necessary if the property was about to be sold.

The record also establishes that the president of Republic, Fred de la Mata, had an unusually close involvement in this loan transaction. De la Mata and other bank officers personally inspected the property. De la Mata claims that he presented the loan to the board for approval during a break at a convention held at the Sofitel Hotel, but he cannot document this meeting. Moreover, the only documentary evidence shows that the board endorsed the loan subsequent to the closing on the property.

Perhaps the most revealing fact in the record is Puentes' sizeable gift to de la Mata's family. Once the loan was approved, Puentes gave de la Mata's son and his fiance a Caribbean honeymoon package consisting of hotel reservations and two first-class, round-trip tickets to St. Thomas and St. Maarten. The package cost approximately $3,000. The travel agent testified that Iglesias actually booked the trip. Iglesias ordinarily paid in cash. This time, the travel agent was paid by check. The check was signed by Munoz, drawn on the new Republic account.

Finally, we note that after the loan was approved, Republic transferred the loan proceeds to Thule's Swiss bank account, through two cashiers' checks for $350,000 each. This transaction was handled by de la Mata's personal assistant.

Republic claims that many elements of this loan transaction are not unusual for South Florida. We emphasize that it is the totality of the circumstances that underlies our finding of actual knowledge. Moreover, even if the loan was not unusual for South Florida, that does not end the Court's inquiry.[11] The question is not whether this was a commercially sound loan. Rather, the Court must consider whether the lender knew that the property had been acquired with drug proceeds. An unusual loan transaction is merely evidence of the lender's knowledge. In any event, we do not believe that Republic has established commercial reasonableness on this factual record.[12]

At trial, de la Mata conceded that he did not rely on Munoz as guarantor of the loan. Nor do we believe that de la Mata relied on Thule. De la Mata testified again and again that the reason he did not investigate either Thule or Munoz was because he relied on Puentes as a long-standing customer of the bank. De la Mata expected to be paid — not by Thule, or even Munoz, but by Puentes. Yet Puentes had no known connection with either Thule or Munoz. Puentes had no known reason to agree to pay the mortgage.

The only rational conclusion is that Republic knew that Thule, a mere shell corporation, was controlled by Puentes. De la

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[11] The Government's expert testified that the loan was "unusual and unsound." The Court agrees, and we adopt the testimony of the Government's expert. Moreover, even the bank's expert admitted that the loan transaction might be considered unusual outside South Florida.

[12] Miraflores argues that the loan must have been reasonable because another bank had offered Puentes a loan on Miraflores. That lender offered a $750,000 loan at sixteen per cent interest. Beyond those facts, the particular circumstances of that loan are not before the Court. Again, we emphasize that determining the lender's knowledge is a fact-sensitive inquiry. That loan offer may well have been improper. Even so, Republic cannot be absolved by another lender's wrongdoing.

Mata must have known that Thule was a vehicle for Puentes. De la Mata knew that Puentes was trying to unload Miraflores. He did not ask why. Instead, in the face of overwhelming evidence, he chose to look the other way. De la Mata deliberately closed his eyes to what he had every reason to believe was the truth. *See United States v. Alvarez*, 837 F.2d 1024, 1028 (11th Cir. 1988) ("deliberate ignorance"); *United States v. Restrepo-Granda*, 575 F.2d 524, 529 (5th Cir. 1978) ("willful blindness").

Republic argues that to deny its claim would mean that banks must become agents for the Government in investigating prospective customers. We disagree. In *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986), the Second Circuit rejected a similar argument in holding that banks might be subject to forfeiture of bank account assets derived from drug proceeds.[13] The Court stated:

> Appellants contend that a broad application of the forfeiture statute to bank accounts will wreak havoc in the banking industry. They argue that banks will accept deposits at their peril, since investigation of the sources would be costly, time-consuming, and often unilluminating. The risk is vastly overstated. A bank has no duty to investigate the source of customers' deposits. It acts at its peril only when, as a passive receiver of knowledge, it learns that a deposit is derived from drug profits and nevertheless accepts that deposit. The statute imposes no investigatory costs on the banking system.

Banco Cafetero Panama, 797 F.2d at 1162.

Puentes was a reliable source of business. De la Mata wanted to make a profit. The honeymoon gift only sweetened the deal. However, drug proceeds are not a permissible source of business for the financial community. As the Eleventh Circuit has observed, "Those who knowingly do business with drug dealers do so at their own risk. [Claimant's] interpretation of 21 U.S.C. § 881(a)(6) would completely insulate money-launderers, and

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[13] Again, neither party has cited this decision.

others who knowingly do business with drug dealers, from possible forfeiture of their ill-gotten gains." *United States v. Four Million, Two Hundred, Fifty-Five Thousand,* 762 F.2d 895, 905 (11th Cir. 1985).

We recognize that a financial cost may attach to imposition of such a standard, in the sense of missed financial opportunity. However, Congress has determined that the financial community must bear some of the costs, because narcotics inflict a much greater cost on society. We agree with the Second Circuit that Congress did not intend to exempt banks from this mandate.

> Nothing in the terms or legislative history of the forfeiture statute gives the slightest reason to believe that Congress wished to accord banks any special insulation from vulnerability to forfeiture of assets traceable to drug proceeds. On the contrary, Congressional concern with money laundering points in precisely the opposite direction.

United States v. Banco Cafetero Panama, 797 F.2d 1154, 1162 (2d Cir. 1986); *cf. ARCA Airlines, Ltda. v. United States Customs Service,* 726 F.Supp. 827 (S.D.Fla. 1989) (Scott, J.) (For common carriers, "[s]ecurity measures [to detect narcotics] are part of the cost of doing business. We do not find the cost excessive in view of the risk.").

The Court concludes that Republic has failed to meet its burden of showing lack of actual knowledge.[14] On the contrary, every fact in the record points irrefutably to Republic's knowing involvement. These facts, when considered in their totality, suggest actual knowledge, if not complicity, on the part of the lender.[15] Congress has sent a clear message in the recent legisla-

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[14] Thus, like the court in *Four Million, Two Hundred and Fifty-Five Thousand Dollars,* 762 F.2d at 906 n. 24, we need not decide whether the claimant must prove that it did all that reasonably could be expected under the *Calero-Toledo* standard.

[15] In view of these factual findings, it is not necessary for the Court to rule on the credibility of the Government's final witness, Rene J. Leonard. However, if the Court were forced to decide this issue, we would be inclined to reject Leonard's testimony.

tion enacted that it will not permit the financial community to knowingly do business with drug dealers. This opinion merely follows that clear message. We do so with little reluctance.

V. CONCLUSION

Based upon the foregoing, it is hereby ORDERED as follows:

1. The Defendant property is subject to forfeiture.

2. Republic's claim is DENIED.

3. The United States is entitled to final judgment.

4. The United States shall submit a final judgment forthwith in accordance with this opinion.

5. The Court retains jurisdiction to effectuate the terms of this order and to assess costs upon appropriate motion.

DONE and ORDERED.

ADI:tc
final judg/forfeiture

FILED by (initialled) D.C.
MAR 15, 1990
ROBERT M. MARCH
CLERK U.S. DIST. CT.
S.D. OF FLA.-MIAMI

CLOSED
CIVIL
CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0349-CIV-SCOTT

UNITED STATES OF AMERICA
Plaintiff.

v.

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 MIRAFLORES AVENUE, CORAL GABLES, FLORIDA, ALSO KNOWN AS LOT 10, IN BLOCK 14, OF COCOPLUM SECTION 2 PLAT "B", ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 115, AT PAGE 84 OF THE PUBLIC RECORDS OF DATE [SIC] COUNTY, FLORIDA, TOGETHER WITH ALL BUILDINGS, FIXTURES AND APPURTENANCES THERETO AND ALL IMPROVEMENTS THEREON,

Defendant.

FINAL JUDGMENT OF FORFEITURE

THIS CAUSE came on before this Court upon trial. This Court has issued its memorandum opinion herein. Accordingly, this Court finds as follows:

1. On February 26, 1988, plaintiff filed a Complaint for Forfeiture *In Rem* against the defendant property alleging that the property is forfeit to the United States of America pursuant to 21 U.S.C. §881(a)(6).

2. The defendant property, which includes all improvements, fixtures, and appurtenances thereto or thereon, is more particularly described as:

> Lot 10, in Block 14, of Cocoplum Section 2 Plat "B", according to the Plat thereof, as recorded in Plat Book 115, at Page 84 of the Public Records of Dade County, Florida.

3. On February 26, 1988, in accordance with the above Complaint, a Warrant of Arrest in Rem of the defendant property was issued and duly executed on March 7, 1988.

4. On March 28, 1988, Public Notice of Action and Arrest of the defendant property appeared by publication in the Miami Review and Proof of Publication of Public Notice of Action and Arrest was filed with the Court on April 5, 1988.

5. In addition to Public Notice of Action and Arrest having been completed, plaintiff personally served the following:

> a. Thule Holding Corporation, by and through its registered agent, as record owner of the defendant property on March 2, 1988.
>
> b. Republic National Bank of Miami, a potentially interested party, on March 2, 1988.
>
> c. Indalecio and Margarita Iglesias, potentially interested parties, on March 1, 1988.

d. Additionally, the Florida Department of Environmental Regulation was served via certified mail, return receipt requested. Notice was accepted on March 2, 1988.

6. Republic National Bank and Thule Holding Corporation have filed claims alleging interests in the defendant property.

7. No other parties have filed claims or answers in this matter.

8. A Memorandum Opinion has been entered by this Court denying all interests claimed by Republic National Bank. Thule Holding Corporation consented to forfeiture of its interests on June 9, 1988. On May 31, 1988, this Court entered an order for interlocutory sale. The defendant real property has already been sold pursuant to that order and this final judgment addresses the remaining proceeds of that sale.

9. The time for which other persons may file a claim and answer has expired.

Based on the above findings, and the Court being otherwise fully advised in the premises, it is hereby;

ORDERED AND ADJUDGED:

1. The court finds that plaintiff United States of America has probable cause to forfeit the defendant real property. This Court finds further that plaintiff United States of America had reasonable cause for this seizure pursuant to 28 U.S.C. §2465.

2. Republic National Bank's claim is denied with prejudice.

3. The proceeds of the interlocutory sale of the defendant real property is forfeited to the United States of America pursuant to 21 U.S.C. §881(a)(6), and no right, title, or interest to those proceeds shall exist in any other party.

4. Since the defendant real property has already been sold pursuant to this Court's prior orders, the United States of America is hereby directed to dispose of the remaining proceeds of the interlocutory sale, in accordance with law.

DONE AND ORDERED in Chambers at Miami, Florida, this 15 day of March, 1990.

/s/
UNITED STATES DISTRICT JUDGE
THOMAS E. SCOTT

cc: U.S. Marshal (2 certified)
Alan Dagen — AUSA
Stanley Beiley, Esq.

UNITED STATES OF America,
Plaintiff-Appellee,

v.

ONE SINGLE FAMILY RESIDENCE
LOCATED AT 6960 MIRAFLORES
AVENUE, etc., Defendant,

Republic National Bank of Miami,
Claimant-Appellant,

Thule Holding Corp., Claimant

No. 90-5295.

United States Court of Appeals,
Eleventh Circuit.
June 10, 1991.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

DYER, Senior Circuit Judge:

This is an appeal of a civil forfeiture case brought by the United States against a parcel of real property situated in the Southern District of Florida. During the pendency of the action below, the real property was sold pursuant to an order of interlocutory sale. The proceeds of the sale were placed in the United States Marshal's account. A final judgment of forfeiture was entered on March 15, 1990. The claimant, Republic National Bank, holder of a mortgage lien on the property, timely filed its notice of appeal, but did not file a motion to stay execution or post a supersedeas bond. On April 20, 1990, the United States Marshal executed the judgment and transferred the proceeds of the interlocutory sale to the Asset Forfeiture Account of the United States Treasury. The United States filed its motion to dismiss the appeal on the ground that this transfer divested this court from

exercising *in rem* jurisdiction over the case. We grant the motion and dismiss the appeal for want of jurisdiction.

Facts

The United States initiated this *in rem* action seeking civil forfeiture of a single family residence located in the Southern District of Florida. The complaint alleged that Indalecio Iglesias owned the property, that he had engaged in narcotics transactions, and had used the proceeds of the transactions to purchase the property. The complaint sought forfeiture under 21 U.S.C. §881(a)(6). Service perfecting *in rem* jurisdiction was made by arresting the defendant property and by giving publication of notice in conformity with Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(4). Additionally, the government sent a notice of the suit to the potential claimant Republic National Bank, who was a mortgagee of the defendant property. Republic filed a claim and answer asserting an "innocent owner" defense.

On May 25, 1988, the government filed an agreed motion seeking a court order authorizing an interlocutory sale of the residence. The motion provided that the proceeds of the sale would be held by the United States Marshal and that the claims to the residence would then attach to the proceeds held by the Marshal, and be subject to the future determination of the court, without prejudice to the rights of any claimant. On May 31, 1988, an order for interlocutory sale was entered by the district court. It provided that all interests of any lienor and claimants would automatically transfer to the proceeds of the sale. The order also instructed the United States Marshal for the Southern District of Florida to retain custody of the proceeds of the sale pending the court's further order. This property was thereafter sold for approximately one million dollars.

During the pendency of the action, the grand jury indicted Indalecio Iglesias in the Southern District of Florida. He was alleged to be the real owner of the property, although Thule

Holding Corporation was the record owner. Iglesias was charged with criminal violations pertaining to the subject residence.

On March 15, 1990, the district court entered a final judgment of forfeiture and directed the United States to dispose of the remaining proceeds of the interlocutory sale, in accordance with law.

Republic timely filed its notice of appeal, but did not file a motion to stay execution of the final judgment or post a supersedeas bond. On April 20, 1990, the United States Marshal executed the judgment and transferred the proceeds of the interlocutory sale to the Asset Forfeiture Account of the United States Treasury.

Contentions of the Parties

On the merits of this appeal, Republic, as mortgagee, seeks to reverse the judgment of forfeiture against it for two reasons. First, it argues that the district court erred in applying a "constructive knowledge", instead of an "actual knowledge", standard to forfeit Republic's mortgage; and second, the court utilized clearly erroneous findings of fact on which to base its legal conclusions. Since the government's motion to dismiss the appeal is dispositive, we do not reach the merits.

The United States contends that when the United States Marshal for the Southern District of Florida executed the final judgment of forfeiture by transferring the substituted *res* from his custody to the Asset Forfeiture Account, no *res* remained in that district; ergo, the transfer divested the district court and this court from exercising *in rem* jurisdiction in this case.

Republic contends that there is continuing jurisdiction in this court because (1) by enacting 21 U.S.C. § 881(j) Congress modified the requirement that the *res* be within the court's territorial jurisdiction for § 881 forfeiture actions; (2) the district court had *in personam* jurisdiction; (3) there was consent to or estoppel to deny jurisdiction.

Jurisdiction Under 21 U.S.C. § 881(j)

Republic argues that Congress has modified the requirement that the *res* be within the court's territorial jurisdiction for Section 881 forfeiture actions and gives this court continuing jurisdiction to hear this appeal. Section 881(j) provides:

> In addition to the venue provided for in Section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this Section, a proceeding for forfeiture under this Section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

Republic reads the statute to mean that once Iglesias was indicted and found in the Southern District of Florida, the effect, under Section 881(j) is to add two bases, in addition to the fact that the property was located in this district, on which the court continues to have jurisdiction even after the property is removed from the district.

We find no support for this novel proposition. By its clear terms Section 881(j) simply affords the government a choice of venue as to where to bring a forfeiture action. It may choose to prosecute the forfeiture action either in the district where the *res* is located, in the district of the criminal prosecution, or the district in which the owner is found. This choice does not extend to claimants. Here the *res*, which was alleged to be owned by Iglesias, was forfeited in the Southern District of Florida. Republic filed its claim in the same district. The fact that Iglesias was indicted in the same district after the institution of the forfeiture proceedings is of no moment. Nor does the fact that Iglesias was found in the Southern District of Florida give continuing jurisdiction after the *res* has been removed. He never filed a claim and was never a party to the lawsuit. Finding Iglesias in the district was not necessary to effect the *in rem* forfeiture. Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(4)

only requires publication and seizure of the defendant property to notify potential claimants. The only basis for jurisdiction in this case is that the defendant property was located and arrested in this district. Accordingly, we find the provisions of Section 881(j) to be irrelevant to this Action.

United States v. One Lear Jet Aircraft, 836 F.2d 1571 (11th Cir.) (en banc), *cert. denied,* 487 U.S. 1204, 108 S.Ct. 2844, 101 L.Ed.2d 881 (1988) controls the result in this case. There the government initiated a forfeiture proceeding against a Lear Jet aircraft located in the Southern District of Florida pursuant to 8 U.S.C. § 1324(b). The aircraft had been used to enter the United States by persons who made material misrepresentations on their visa applications. Leybda Corporation filed a claim to the aircraft, but, after trial, the district court entered a judgment of forfeiture for the United States. Leybda filed a timely notice of appeal, but did not file a motion for stay or judgment or a supersedeas bond. The government executed the judgment by removing the aircraft to Missouri. On *en banc* reconsideration of this *in rem* jurisdictional issue, the court held that:

> We now hold that, because removal of the *res* from a court's territorial jurisdiction destroys that court's *in rem* jurisdictional, *Pennington v. Fourth National Bank,* 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713 (1917), this Court does not have jurisdiction to hear Leybda's appeal. The general rule of *in rem* jurisdiction is that the court's power derives entirely from its control over the defendant *res. Id.* at 272, 37 S.Ct. at 283; *L.B. Harvey Marine, Inc. v. M/V River Arc,* 712 F.2d 458, 459 (11th Cir. 1983). Where an appellant fails to file a stay of judgment or a supersedeas bond, and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction. *Taylor v. Tracot Marine, Inc.,* 683 F.2d 1361, 1362 (11th Cir. 1982), *cert. denied,* 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); *Parks v. B.F. Leaman & Sons, Inc.,* 279 F.2d 529, 532 (5th Cir. 1960). This Circuit has recently reaffirmed this

traditional rule. *See Harvey Marine,* 712 F.2d at 459; *Taylor,* 683 F.2d at 1362.

Id. at 1573. We reiterated this rule in *United States v. One 1983 Homemade Vessel Named Barracuda,* 858 F.2d 643, 647 (11th Cir. 1988).

In *United States v. $57,480.05 U.S. Currency and Other Coins,* 722 F.2d 1457 (9th Cir. 1984), after a judgment of forfeiture was entered, the United States Marshal executed the judgment by delivering the funds held by him to the United States Attorney, who caused them ultimately to be paid into the United States Treasury. The claimant never sought a stay of execution of the judgment. The court dismissed the appeal holding that:

> In conducting this forfeiture proceeding, the district court was exercising *in rem* jurisdiction and the currency was the *res*. The power of the court derived entirely from its control over the defendant *res*. (citations omitted). Release or removal of the *res* from the control of the court ended the jurisdiction of the court, in accordance with the general rule.
>
> * * * * *
>
> The destruction of the district court's jurisdiction puts an end to ours as well. Were we to reverse the judgment of the district court, there would be no *res* upon which our mandate could operate. (citation omitted).

Id. at 1458-59.

Republic's attempt to avoid the impact of *One Lear Jet* by the misapplication of 21 U.S.C. § 881(j) is unavailing.

In Personam Jurisdiction

Republic asserts that even though this case was commenced as an *in rem* forfeiture action, once the government personally served Republic with process, and Republic filed a general ap-

pearance, this case became, as between Republic and the government, one involving both *in rem* and *in personam* jurisdiction. Therefore, even if the court lost *in rem* jurisdiction over the *res*, there would be continuing jurisdiction to hear this appeal.

The short answer to this argument is that this forfeiture action was initiated under Rule C of the Supplemental Rules. The defendant is the property. Under this Rule, the only requirement for *in rem* jurisdiction is that upon the filing of the complaint, there must be a publication of notice that the property has been arrested. The claimants are invited to file claims. Republic was not a named defendant and was not summoned into court under Fed.R.Civ.P. 4. Although not required to do so, the government served potential claimants with copies of the complaint and warrant of arrest of the defendant property, which notified them that the *res* was subject to forfeiture. Like *One Lear Jet*, the government never invoked *in personam* jurisdiction when it brought suit. It served the property, not the purported mortgagee who later filed a claim. Its jurisdiction was based solely on the *res;* the government did not consent to the court's *in personam* jurisdiction. It merely brought a forfeiture action against the defendant property. As the court there held:

> [W]e reject the notion that the United States consented to *in personam* jurisdiction by invoking the district court's *in rem* jurisdiction initially. To hold that the government "consented" to *in personam* jurisdiction would be tantamount to deciding that a court has *in personam* jurisdiction over any participant in an *in rem* proceeding. This does not comport with the traditional analysis of *in rem* jurisdiction. (Footnotes omitted).

Id. at 1576-77. The United States cannot be construed as consenting to *in personam* jurisdiction merely by notifying potential claimants that an *in rem* action has commenced.

Consent to or Estoppel to Deny Jurisdiction

In May 1988, at the government's request, Republic agreed to an interlocutory sale of the property. The agreed motion states in pertinent part:

> All present or possible liens or other claims to the defendant property will attach to the proceeds held by the Marshal, and will be subject to future determination by the court without prejudice to the right of any claimant.

The district court's order, entered upon the motion states, in pertinent part, that "all interests of any lienors and claimants shall automatically transfer to the proceeds of the sale. These interests shall be afforded the same priority on the proceeds as these interests had on the real property...." Further, the proceeds were payable "to the United States Marshal for the Southern District of Florida, who shall retain same in his custody pending this court's further order." Republic argues that the "without prejudice" agreement for the interlocutory sale of the property constituted the government's consent to the continued jurisdiction of this court, regardless of what happened to the substituted *res*. Moreover, Republic submits that the government's conduct in obtaining Republic's consent to a physical change in the *res* by announcing it would be "without prejudice", and then utilizing the physical change to prejudice Republic by defeating jurisdiction prompts the application of the principle that where removal of the *res* from the court's territorial jurisdiction is accidental, fraudulent or improper, removal of the *res* does not defeat *in rem* jurisdiction.

We do not agree with Republic's conclusions drawn from its reading of the agreed motion and the order entered thereon. Republic's lien on the defendant property attached to the proceeds of the sale, subject to the future order of the court. It litigated its claim and pursued all of its remedies against the proceeds just as they could have been asserted against the defendant real property. The final judgment of forfeiture ordered the United States to dispose of the proceeds according to law.

Republic had the option to move for a stay of execution or post a supersedeas bond to stay the release of the substituted *res*. It did neither. By complying with the district court's order, the government's conduct in executing upon the judgment was neither fraudulent nor improper. *One Lear Jet*, 836 at 1574 n. 2. *See United States v. $79,000 in U.S. Currency*, 801 F.2d 738 (5th Cir. 1986).

Conclusion

This appeal is DISMISSED for want of jurisdiction.

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
AUG 7 1991
MIGUEL J. CORTEZ
CLERK

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-5295

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 Miraflores Avenue, etc.,

Defendant

REPUBLIC NATIONAL BANK OF MIAMI,

Claimant-Appellant,

THULE HOLDING CORP.,

Claimant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF HEARING EN BANC (Opinion *June 10, 1991,* 11th Cir., 19__, _____ F.2d _____).

Before: KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
AUG 26 1991
MIGUEL J. CORTEZ
CLERK

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

For The Eleventh Circuit

No. 90-5295

D.C. Docket No. 88-349-CIV-TES

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE SINGLE FAMILY RESIDENCE LOCATED AT 6960 Miraflores Avenue, etc.,

Defendant

REPUBLIC NATIONAL BANK OF MIAMI,

Claimant-Appellant,

THULE HOLDING CORP.,

Claimant.

Appeal from the United States District Court
for the Southern District of Florida

Before: KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the appeal in the above styled and numbered cause be and the same is hereby DISMISSED;

IT IS FURTHER ORDERED that claimant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 10, 1991
For the Court: Miguel J. Cortez,
Clerk

By: /s/ _____
Deputy Clerk

ISSUED AS MANDATE: AUG 26, 1991

Supreme Court, U.S.
FILED
APR 22 1992
OFFICE OF THE CLERK

No. 91-767

In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF ON THE MERITS BY PETITIONER

STANLEY A. BEILEY*
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QUESTION PRESENTED FOR REVIEW

Whether a stay or supersedeas bond is necessary to preserve appellate jurisdiction in a civil forfeiture case?

PARTIES TO THE PROCEEDING

Petitioner: Republic National Bank of Miami, a national banking association.*

Respondent: United States of America

*Other parties below:***

Thule Holding Company

Indalecio Iglesias

---

* Pursuant to Sup. Ct. R. 29.1, Republic is a wholly owned subsidiary of Republic Banking Corporation of Florida, a Florida corporation. There are no non-wholly owned subsidiaries of Republic.

** As this is a civil forfeiture action, the property, One Single Family Residence Located at 6960 Miraflores Avenue, was the "defendant" in the courts below.

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G. Gilmore and C. Black, The Law of Admiralty, 1st Ed. (1957) 8

G. Gilmore and C. Black, The Law of Admiralty, 2d Ed. (1975) 6

Table C2, Administrative Offices of the U.S. Courts, Analysis and Reports Board, Statistics Division 21

In the
Supreme Court
of the
United States

OCTOBER TERM, 1991

No. 91-767

REPUBLIC NATIONAL BANK OF MIAMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

BRIEF ON THE MERITS BY PETITIONER

REFERENCE TO OPINIONS BELOW

The opinion of the court of appeals is reported as *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 932 F.2d 1433 (11th Cir. 1991), and is reproduced in the Joint Appendix at pages JA 29-37. The memorandum opinion of the district court is reported as *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 731 F.Supp. 1563 (S.D. Fla. 1990), and is reproduced in the Joint Appendix at pages JA 5-24.

JURISDICTION

This Court's jurisdiction to review the judgment by writ of certiorari is invoked under 28 U.S.C. § 1254(1). The judgment appealed from was rendered by the Eleventh Circuit Court of Appeals on June 10, 1991. (JA 29). A timely petition for rehearing and suggestion for rehearing *en banc* was denied by order dated August 7, 1991. (JA 38-39). This Court granted the petition for writ of certiorari by order dated February 24, 1992.

RULES AND STATUTES INVOLVED

This Petition involves Rule 3(a) of the Federal Rules of Appellate Procedure, which provides:

Rule 3. Appeal as of Right — How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

STATEMENT OF THE CASE

The Government filed this action under 21 U.S.C. § 881(a)(6), seeking civil forfeiture of a single family home located in Miami, Dade County, Florida. (JA 26). Petitioner Republic held a mortgage which encumbered the home and filed its Answer and Verified Claim as mortgagee. (JA 6). By Stipulation and Court Order, the real property was sold during the pendency of the case for approximately $1 million, which was turned over to the United States Marshal for the Southern District of Florida as a substitute for the real property. (JA 6).

After a trial on the merits, the district court entered judgment denying Republic's mortgage claim and forfeiting the property. (JA 25-28). Republic timely filed its notice of appeal but did not post a bond to supersede the district court's judgment. (JA 31). Thereafter, at the *ex parte* request of the Government, the United States Marshal transferred the cash proceeds to the Asset Forfeiture Account of the United States Treasury. *(Id.)* The Government then moved to dismiss the appeal, which motion was granted by a panel of the Eleventh Circuit. (JA 40-41). Republic unsuccessfully petitioned for rehearing and suggestion for rehearing *en banc*. (JA 38-39).

In its Opinion, the Eleventh Circuit held that once the Government transferred the cash proceeds of the sale to the Asset Forfeiture Account purportedly outside of the Southern District of Florida, both the district court and the appellate court were divested of jurisdiction. *United States v. One Single Family Residence Located at 6960 Miraflores Avenue,* 932 F.2d 1432, 1435-36 (11th Cir. 1991). (JA 33-34). The court ruled that *United States v. One Lear Jet Aircraft,* 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied,* 487 U.S. 1204 (1988), "controls the result in this case." 932 F.2d at 1435. (JA 33). In *One Lear Jet,* the Eleventh Circuit, in a sharply divided 6-5 decision, ruled that "because removal of the *res* from a court's territorial jurisdiction destroys the court's *in rem* jurisdiction, this Court does not have jurisdiction to hear [the claimant's] appeal." 836 F.2d at 1573 (citations omitted). In the decision below, the Panel rejected all of Republic's contentions, including that the court continued to have *in personam* jurisdiction even after the *res* was removed by the Government. 932 F.2d at 1436-37. (JA 34-35).

SUMMARY OF ARGUMENT

In civil forfeiture actions, money seized at the inception of the action is usually deposited in the court registry or the Justice Department's Seized Assets Deposit Fund pending the outcome of the case. The Government contends, and the Eleventh Circuit agreed below, that if the Government prevails at trial, it can "transfer" the money to its Asset Forfeiture Account in Washing-

ton, D.C. and thereby divest the appellate court of jurisdiction to hear an appeal, unless the losing party posts a supersedeas bond to stay the final judgment.

The Government's post-judgment "transfer" of seized funds does not and should not divest the appellate court of jurisdiction for several reasons.

First, the Government's contention conflicts with the federal appellate rules. The only requirement for appellate jurisdiction is the timely filing of a notice of appeal. Neither a bond nor stay of the final judgment pending appeal is necessary to appellate jurisdiction.

Second, the Government's contention is based in part on the "ship personification" admiralty fiction, but the analogy is inappropriate. Even in admiralty actions, continuous physical possession of the *res* by the court, after initial seizure, has never been an immutable rule of jurisdiction. Moreover, the "ship personification" fiction was created to broaden jurisdiction and the availability of remedies. The fiction should not be used as a weapon to defeat jurisdiction.

Third, while civil forfeiture cases are labelled proceedings *in rem*, by bringing the case and seeking affirmative relief, the Government, as plaintiff, submits itself to the *in personam* jurisdiction of the court. Just as a party cannot defeat appellate jurisdiction by leaving the district after the trial, removal of the *res* in a civil forfeiture case by the successful plaintiff should not defeat appellate jurisdiction. The Government's reliance on what it asserts are unique rules of *in rem* jurisdiction is misplaced. Several decisions of this Court have mandated that the same rules apply equally to both *in rem* and *in personam* actions.

Fourth, the Government's contention is particularly inappropriate in currency forfeiture cases. Because money is fungible, it is specious to argue that the seized funds are "transferred" from the jurisdiction when all that occurs is a bookkeeping entry showing a debit to one government account and a credit to another government account.

Fifth, in civil forfeiture cases brought under 21 U.S.C. § 881, the location of the property is no longer the sole basis on which a court may base jurisdiction. Whenever, as in this case, the owner of the property is found in the district, or the owner is indicted in the district for a violation that is also the basis for the forfeiture, jurisdiction attaches without regard to the location of the property.

Sixth, the Government's contention that a stay is necessary to appellate jurisdiction leads to unfair results. Ordinarily, a court requires a supersedeas bond before entering a stay. If a stay is necessary, claimants who cannot afford to post a bond will be denied the right to appeal. The Government's contention also requires a claimant to obtain a stay within ten days of entry of judgment, failing which the Government can remove the property and defeat appellate jurisdiction. Litigants will no longer have the thirty days specified in the appellate rules to decide whether to take an appeal, but rather will have to act immediately on entry of judgment. This will, in turn, lead to a flood of emergency stay motions, imposing additional burdens on already overcrowded federal courts.

Seventh, the Government's contention is fundamentally unjust. The purpose of a supersedeas bond and stay pending appeal is to protect the interests of the prevailing party by assuring collection of a judgment. In a civil forfeiture case, after judgment, the Government controls the property; consequently, the Government does not need further protection. To require a stay and supersedeas bond under these circumstances does not further any remedial purpose, but only provides a weapon to defeat appellate rights.

ARGUMENT

For the reasons which follow, this Court should vacate the Eleventh Circuit's judgment dismissing Republic's appeal and order that the appeal be reinstated.

A. *The Government's Contention is Contrary to the Rules of Appellate Jurisdiction.*

Under the Federal Rules of Appellate Procedure, a stay of a judgment is unnecessary to appellate jurisdiction. Fed.R.App.P. 3(a) provides that an appellate court has jurisdiction of an appeal as soon as a notice of appeal is filed in the district court. While the filing of the notice of appeal is "mandatory and jurisdictional," *United States v. Robinson,* 361 U.S. 220, 224 (1960), the "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal ...." Fed.R.App.P. 3(a). Generally, the only consequence of failing to obtain a stay of a final judgment pending appeal is that the prevailing party may execute on the judgment ten days after its entry. Fed.R.Civ.P. 62(a). Even if the prevailing party, on execution, removes the property while the case is on appeal, the appeal goes forward. *County of Dakota v. Glidden,* 113 U.S. 222, 224 (1885).

B. *The Government's Contention is Based on a Fundamentally Flawed and Inapplicable Analogy to Admiralty Law.*

Although the appellate rules do not require a stay or a bond to appeal, the Government contends that a bond and a stay are required in civil forfeiture cases. The Government bases its contention on an analogy to the ancient fiction of the "personification" of a ship originating in admiralty cases.

"Libels in admiralty may be *in rem* or *in personam.* It is customary to say that the action *in rem* is brought against the vessel while the action *in personam* is against the owner." *G. Gilmore and C. Black, The Law of Admiralty,* 2d Ed. (1975) at 613. In an *in rem* libel, instead of suing the human wrongdoer, the plaintiff sued the ship itself as "the offending thing." *Id.* at 589. *In rem* admiralty jurisdiction vests upon "seizure of the res and the publication of the monition or invitation to appear ...." *Taylor v. Carryl,* 61 U.S. (20 How.) 583, 599 (1858).

Some lower court admiralty cases have held that if the ship leaves the jurisdiction during the case, the court no longer has jurisdiction to proceed. *E.g., L.B. Harvey Marine, Inc. v. M/V "River Arc",* 712 F.2d 458, 459 (11th Cir. 1983), *Taylor v. Tracor Marine, Inc.,* 683 F.2d 1361, 1362 (11th Cir. 1982), *cert.*

denied, 460 U.S. 1012 (1983). The Government relies on these cases, by analogy, in moving to dismiss appeals from civil forfeiture judgments after the Government has removed the *res* from the jurisdiction. *See United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988) (citing *Harvey* and *Taylor*, *supra*).

The Government's argument by analogy is flawed for several reasons. First, continuous physical possession of the *res* has never been an immutable rule of jurisdiction. Over one hundred years ago, this Court rejected the premise, implicit in the Government's argument, that continuous presence of the *res* is jurisdictionally required in *in rem* cases. In *The Rio Grande v. Otis*, 90 U.S. (23 Wall.) 458 (1875), an admiralty case, this Court held that where the ship was improperly released by the marshall, the court's jurisdiction was not divested, since "actual and continuous possession of the res" is not required to sustain jurisdiction. *Id.* at 463. This Court explained that "[w]hen the vessel was seized by the order of the court and brought within its control, the *jurisdiction was complete*." *Id.* (emphasis added). If, as the Government argues, jurisdiction depended on continuous physical possession of the *res* after seizure, a removal of the *res* for any reason, proper or improper, would destroy jurisdiction. The Government's argument, therefore, cannot be squared with the result or rationale of *The Rio Grande*.[1]

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[1] The holding in *The Rio Grande* that "jurisdiction was complete" as soon as the *res* was seized is also consistent with the rule in subject matter jurisdiction that:

> Jurisdiction of a suit, once acquired by a court of the United States by reason of the requisite citizenship, is not lost by a change in the citizenship of either party pending the suit.

Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co., 174 U.S. 552, 566 (1899). The rule is the same as to amount in controversy, *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938) ("[e]vents occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction") and as to jurisdiction over the person, *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 353 (1913) ("if a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause").

Second, this Court has noted the criticisms of the "ship personification" fiction as "archaic," "an animistic survival from remote times," "irrational" and "atavistic." *Continental Grain Co. v. The FBL - 585*, 364 U.S. 19, 23 (1960) (quoting *The Carlotta*, 48 F.2d 110, 112 (2d Cir. 1931) and *G. Gilmore and C. Black, The Law of Admiralty*, 1st Ed. (1957) at 508).

Third, whatever continued validity the "ship personification" fiction may have in admiralty law, the Government's attempt to apply it, as a rationale to dismiss appeals in civil forfeiture cases, should be rejected. In *Continental Grain, supra*, this Court explained that the ship personification fiction was created to broaden jurisdiction, not narrow it:

> A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still.

364 U.S. at 23. This Court rejected the attempted extension of the ship personification fiction beyond its admiralty origins:

> We are asked here, however, to transplant this ancient saltwater admiralty fiction into the dry land context of *forum non conveniens*, where its usefulness and possibilities for good are questionable at best. . . . *A fiction born to provide convenient forums should not be transferred into a weapon to defeat that very purpose.*

Id. at 23 (emphasis added).

The Government relied below principally on *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988), in moving to dismiss the appeal. In that case, the Eleventh Circuit, in a 6-5 *en banc* decision, held that appellate jurisdiction was lost once the Government flew the forfeited aircraft outside the territorial jurisdiction of the court. The majority opinion relied on its admiralty precedent, *Harvey* and *Taylor, supra*, to support its ruling. Judge Vance, in dissent, explained why the admiralty precedents were inapposite:

> The majority compounds the problem by misapplying an already shaky admiralty rule to the facts of this case. The jurisdictional issue in this case involves the United States, not the claimant Leybda. The plaintiff United States after initially invoking the jurisdiction of the federal courts and then removing the *res* from the district, now claims lack of subject matter jurisdiction in order to defeat claimant's attempt to appeal to this court. This is the exact opposite of what usually occurs in *in rem* cases, where the defendant ship stealthily absconds from port and leaves the plaintiff with no *res* from which to collect.

836 F.2d at 1579 (citations omitted).

Other appellate courts have also rejected the application of this admiralty analogy to forfeiture cases. In *United States v. Aiello*, 912 F.2d 4 (2d Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 757 (1991), the Second Circuit reasoned:

> [T]he concepts of continuing territorial presence and control in forfeiture actions derive from the admiralty fiction of a ship's personality, a legal construct of dubious validity. With the force of these concepts diminishing in admiralty, they surely ought not to be routinely invoked to deny citizens an opportunity for appellate review of judgments forfeiting their property to the Government.

912 F.2d at 6-7 (citations omitted). *See also United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417, 1419-20 (1st Cir. 1991) ("[t]here is no good reason why the Government should be allowed to insulate itself from the appellate process by wrapping itself in the mantle of an admiralty fiction designed at an earlier time to meet a problem totally unrelated to present day civil forfeiture proceedings").

The body of admiralty law predicated on the personification of a ship does not support, either in theory or historical purpose, the position which the Government advocates.

C. *The Government's Contention is Contrary to Basic Principles of Jurisdiction*

When a plaintiff commences a civil case and seeks the assistance of the courts to secure affirmative relief, the plaintiff submits to the court's *in personam* jurisdiction. The fact that the relief sought is "only" title to property, and not an *in personam* judgment against a defendant, relates only to the jurisdiction a court acquires over the defendant, not the plaintiff. More than fifty years ago, this Court observed, in a different context:

> The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.

Adam v. Saenger, 303 U.S. 59, 67-68 (1938). *See Frank L. Young Co. v. McNeal-Edwards Co.*, 283 U.S. 398, 400 (1931) ("the plaintiff being already in court qua plaintiff by his own voluntary act, it is reasonable to treat him as being there for all the purposes for which justice to the defendant requires his presence").

This has always been the rule in this Court as to appellate jurisdiction. In *Nations v. Johnson*, 65 U.S. (24 How.) 195 (1860), after the non-resident defendants prevailed in the trial court, defendants' lawyer withdrew as counsel, and the defendants were never thereafter personally served with any subsequent pleadings. As provided in the applicable state statute, the plaintiff/appellant gave notice by publication of the writ of error. 65 U.S. at 201. The appellate court proceeded to hear and determine the appeal in favor of the plaintiff/appellant. Later, the defendants challenged the jurisdiction of the appellate court, citing "[n]umerous cases . . . which assert the general rule" that notice by publication is insufficient to give a court *in personam* jurisdiction over a non-resident. This Court distinguished those cases, rejecting the proposition that one who prevails at trial may

> [v]oluntarily absent himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn.

65 U.S. at 203-04. This Court recognized that:

> To admit the proposition, would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court.

65 U.S. at 204. In *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 454 (1932), this Court citing *Nations, supra*, reaffirmed that

> [a]fter a final decree a party cannot defeat the jurisdiction of the appellate tribunal by removing from the jurisdiction, as the proceedings on appeal are part of the cause.

Several lower federal courts have applied the same principles in civil forfeiture cases. Those courts recognize that the appellate court can never lose jurisdiction over the Government because the Government, by bringing the action, has submitted itself to the *in personam* jurisdiction of the court. In *United States v. $12,390*, 956 F.2d 801, 804 (8th Cir. 1992), the court found persuasive the line of reasoning that:

> [B]y initiating an action in federal court, the government has subjected itself to the court's in personam jurisdiction. . . . [D]espite the government's distribution of the res, the Court retains jurisdiction over the parties throughout the case.

(citations omitted). The Second Circuit also agreed that since the Government institutes civil forfeiture cases, the United States, " '[h]aving submitted itself to the jurisdiction of the court, . . .

should not be allowed to escape' appellate review of the judgment it has obtained." *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990), *cert. denied*, ___ U. S. ___, 111 S.Ct. 757 (1991) (quoting *One Lear Jet*, 836 F.2d at 1579). *See also United States v. $95,945.12*, 913 F.2d 1106, 1109 (4th Cir. 1990) (agreeing with *Aiello*). Judge Edmondson expressed a similar view in his dissent in *One Lear Jet, supra:*

> The idea that, when a plaintiff comes into a court system requesting the courts' assistance in resolving a case, the plaintiff submits its person to the jurisdiction of those courts until the case is finally concluded seems to be to be neither innovative nor unfair. I agree with Judge Vance when he says that "we have had in personam jurisdiction over the United States from the instant the government invoked the jurisdiction of the federal courts to initiate the forfeiture proceeding."

836 F.2d at 1584.

Developments in the law concerning *in rem* and *in personam* jurisdiction fully support these civil forfeiture decisions. As in the case of admiralty law, *in rem* jurisdiction in non-admiralty cases was developed to broaden the availability of remedies for plaintiffs seeking to sue out-of-state defendants. *Pennoyer v. Neff*, 95 U.S. 714 (1877). The distinguishing features of *in rem* jurisdiction traditionally were seizure of property and notice by publication, and neither minimum contacts nor personal service of process were required to sustain *in rem* jurisdiction.

As the underlying rationale for *in rem* jurisdiction became less important with the increasing use of long arm statutes to confer *in personam* jurisdiction, this Court narrowed the distinction between *in rem* and *in personam* jurisdiction. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), this Court rejected the contention that there is a substantive difference between the requirements of *in rem* and *in personam* jurisdiction:

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of

> the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.
>
> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe*, and its progeny.

433 U.S. at 212. More recently, in *Burnham v. Superior Court*, 465 U.S. 604, 620 (1990), this Court explained the "logic of *Shaffer's* holding," which

> places all suits against absent nonresidents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact.

The other traditional feature of *in rem* jurisdiction, service by publication, has also been eroded. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court held that due process of law mandates actual notice, where possible, that service of process by publication is insufficient as to known claimants, and that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon" whether the action was labeled *in rem* or *in personam*. *Id.* at 312. The holding of *Mullane* has been applied to a wide variety of *in rem* actions: *Tulsa Professional Collections Serv. v. Pope*, 485 U.S. 478 (1988) (probate); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (eminent domain); *Schroeder v. City of New York*, 371 U.S. 208 (1962) (riparian rights); *Wisconsin Elec. Power Co. v. City of Milwaukee*, 352 U.S. 948 (1956) (tax assessment proceedings); *City of New York v. New York, N.H&H.R. Co.*, 344 U.S. 293 (1953) (bankruptcy proceedings).

These cases show that the same basic legal principles apply in both *in rem* and *in personam* cases. Even in admiralty cases, this Court has questioned the distinction between *in rem* and *in personam* jurisdiction. More than one hundred years ago, this Court wrote:

> To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated ....

Place v. Norwich and N.Y. Transp. Co., 118 U.S. 468, 503 (1886). Sixty years later, this Court observed: "The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age." *Consumers Import Co. v. Zosenjo*, 320 U.S. 249, 253 (1943).

The Government as plaintiff comes before the court seeking to have it exercise its power to forfeit property. The Government cannot, simply by removing that property to another district, avoid the consequences of having submitted itself to the jurisdiction of the court, any more than it could by "removing" itself to another district.

D. *The Government's Contention Should Not Apply to Currency Forfeiture Cases.*

The Government's contention is particularly specious in cases involving forfeiture of money. The Government argues that appellate jurisdiction terminates when it "transfers" the money from a Government account within the territorial jurisdiction of the court to a Government account in Washington, D.C. That contention is inconsistent with settled commercial principles.

Since "[t]he relationship of bank and depositor is that of debtor and creditor," *Bank of Marin v. England*, 385 U.S. 99, 101 (1966), when money is deposited in a bank account, it becomes a debt of the bank to the depositor. *Barnhill v. Johnson*, ____ U.S. ____, 60 U.S.L.W. 4264, 4265 (March 25, 1992). When the Government, as depositor, "transfers" funds between accounts, all that has really occurred is a bookkeeping entry, not the physical delivery of cash from one bank to another, since "[u]nlike real or personal property, money is fungible." *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989).

One of the consequences of the fungibility of money is that funds deposited in a bank lose their identity. When funds are deposited, title to those funds passes to the bank, and the depositor, as creditor, has the right to demand payment of the equivalent amount, but not the identical funds. *E.g., C.I.R. v. Hendrickson*, 873 F.2d 1018, 1023-24 (7th Cir. 1989); *Crocker-Citizens Nat'l Bank v. Control Metals Corp.*, 566 F.2d 631, 637 (9th Cir. 1977); *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 560 (7th Cir. 1976); *United States v. Citizens and Southern Nat'l Bank*, 538 F.2d 1101, 1105 (5th Cir. 1976).

It is fanciful to argue that specific forfeited money which was deposited into an account is "transferred" out of the jurisdiction. As the Third Circuit recently explained in a civil RICO case:

> Legally as well as economically, money is fungible — if the debtor with $100,000 cash in its general coffers owes $10,000 to someone, there is no meaningful distinction among which of those dollars is actually paid to satisfy the debt.

Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 195-96 (3d Cir. 1990). *See also United States v. Fidelity Philadelphia Trust Co.*, 459 F.2d 771, 776 (3d Cir. 1972) ("the reality is that most banking transactions are by check and, insofar as the bank is concerned, 'possession' of depositor's funds is merely a computer entry on a bookkeeping ledger").

It is for this reason that several courts of appeal have held that in currency forfeiture cases, the Government may not divest a court of jurisdiction by "transferring" the forfeited funds, since, in reality, the forfeited funds have not been transferred. In *United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417 (1st Cir. 1991), the court rejected the argument that the Government can defeat appellate jurisdiction by moving money from one Government bank account to another:

> Jurisdiction based on the location of the *res* is particularly inapposite to a currency forfeiture case. The government has possession and control of the currency from the time it

> seizes it. The execution of the judgment merely transfers it from one government pocket to the other. Basing jurisdiction on what pocket contains the currency is nothing more than a shell game.

Id. at 1420.

In *United States v. $1,322,242.58*, 938 F.2d 433 (3d Cir. 1991), the Third Circuit agreed:

> [W]e do not think that rules concerning physical location can be applied in any meaningful sense to an incorporeal *res* such as that involved in this case. The *res* at issue here is merely an entry in a Justice Department account with the United States Treasury. In other words, the *res* is an obligation on the part of the Treasury to disburse the specified sum to the Department of Justice. Deeming this obligation to be located at any particular place within the United States would be a complete fiction. If we are compelled, however, to determine where this obligation is "located," we cannot say that the obligation does not exist in every part of the country, including the District of Delaware.

Id. at 437-38.

E. *The Government's Contention is Contrary to 21 U.S.C. § 881(j).*

In this case, 21 U.S.C. § 881(j) provides an additional basis for jurisdiction, without regard to the location of the property. By statute, the United States District Courts have "original jurisdiction of all civil actions, suits or proceedings commenced by the United States...." 28 U.S.C. § 1345. Additionally, the United States District Courts have exclusive jurisdiction "of any action or proceeding for the recovery or enforcement of any ... forfeiture ... incurred under any Act of Congress." 28 U.S.C. § 1355. Appellate jurisdiction vests in the United States Courts of Appeals "from all final decisions of the district courts of the United States ...." 28 U.S.C. § 1291.

A special venue statute, 28 U.S.C. § 1395(b), applies in civil forfeiture cases: "a civil proceeding for the forfeiture of property may be prosecuted in any district were such property is found."

In 1984, Congress enacted 21 U.S.C. § 881(j) which provides:

> In addition to the venue provided for in Section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

The United States instituted this forfeiture action under 21 U.S.C. § 881(a)(6). (JA 26). The United States "found" the owner of the property, Indalecio Iglesias, in the Southern District of Florida and personally served him with process. (JA 26). At that point, pursuant to § 881(j), the district court's jurisdiction was complete without regard to the location of the property. Since the property was also located in the Southern District of Florida, there was a second basis for jurisdiction under § 881(j). Moreover, during the pendency of the action, the Grand Jury sitting in the Southern District of Florida indicted Iglesias in that district, charging him with criminal violations pertaining to the subject property. *United States v. One Single Family Residence Located at 6960 Miraflores Avenue*, 932 F.2d 1433, 1434 (11th Cir. 1991). (JA 30-31). At that point, under § 881(j), there were three bases for jurisdiction.

Thereafter, the district court entered its final judgment and Republic took an appeal. The Government then purported to "transfer" the money to its Asset Forfeiture Account outside of the Southern District of Florida and moved to dismiss the appeal.

Republic opposed the motion to dismiss on the grounds that the other two bases for jurisdiction specified in § 881(j) were

present, regardless of the location of the property. The Eleventh Circuit, in dismissing the appeal, ruled that:

> By its clear terms Section 881(j) simply affords the government a choice of venue as to where to bring a forfeiture action. It may chose to prosecute the forfeiture action either in the district where the *res* is located, in the district of the criminal prosecution, or the district in which the owner is found. This choice does not extend to claimants. Here the *res*, which was alleged to be owned by Iglesias, was forfeited in the Southern District of Florida. Republic filed its claim in the same district. The fact that Iglesias was indicted in the same district after the institution of the forfeiture proceeding is of no moment. Nor does the fact that Iglesias was found in the Southern District of Florida give continuing jurisdiction after the *res* has been removed. He never filed a claim and was never a party to the lawsuit. Finding Iglesias in the district was not necessary to effect the *in rem* forfeiture.

932 F.2d at 1435. (JA 32).[2] The Eleventh Circuit found § 881(j) was "irrelevant to this action" and that "[t]he only basis for jurisdiction in this case is that the defendant property was located and arrested in this district." 932 F.2d at 1435. (JA 33).

The Eleventh Circuit misconstrued the significance of § 881(j). Under that statute, the Government has the initial choice of where to bring this action, and § 881(j) broadens that choice. The Government selected the Southern District of Florida, but in making that choice, the Government did not announce that it was making its selection "only" because the property was located there, or "only" because the owner was found there, or "only" because the owner would be indicted there. In fact, the Southern District of Florida was an appropriate place in which to bring this action for all three reasons. Only one basis for jurisdic-

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[2] The Eleventh Circuit's statement that Iglesias "never filed a claim" is incorrect. Thule Corporation filed a claim as owner of the property. (JA 6). The district court found that "Thule was the straw owner for Iglesias." (JA 10).

tion is necessary. The fact that after the judgment, the Government "transferred" the property out of the Southern District of Florida *arguendo* eliminated one basis for jurisdiction to hear Republic's appeal. However, there remained two other bases for jurisdiction, and the appeal should not have been dismissed.

F. *The Government's Contention is Unfair and Unjust.*

There is no compelling legal support for the Government's contention. Moreover, adoption of the Government's position would lead to several undesirable consequences.

1. *Parties who cannot afford a bond will lose their right to appeal.*

The Government's position effectively limits the right to appeal forfeiture judgments to wealthy claimants. Supersedeas bonds are expensive. Bonding companies charge substantial premiums to issue bonds and typically require collateral to secure them. Requiring claimants to obtain a stay in order to appeal will result in cases in which parties will lose the right to appeal because they are unable to post a supersedeas bond.

Under Fed.R.Civ.P. 62(d), a supersedeas bond is a prerequisite for a stay.[3] In *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988), the *res* was a multimillion dollar aircraft. According to Judge Vance's dissenting opinion, "[t]he claimant-appellant was unable

---

[3] There is some authority that a district court may enter a stay order without the necessity of a bond:

> in unusual circumstances, however, the district court in its discretion may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery.

Federal Prescription Serv., Inc. v. Am. Pharm. Ass'n, 636 F.2d 755, 760-61 (C.A.D.C. 1980). There are, however, contrary cases. Id. at 757 n. 3 (collecting authorities). While there are some courts which might grant a stay for an already impecunious party, there are apparently no courts which will dispense with a bond where posting a bond would render the party insolvent. *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 874 (10th Cir. 1986).

to supersede the forfeiture judgment because it lacked the funds to do so." 836 F.2d at 1577-78. As a consequence, the Government removed the plane to Missouri, and the Eleventh Circuit dismissed the appeal on the Government's motion. In dissent, Judge Vance emphasized the unfairness of this result:

> Federal law and rules of procedure provide that a judgment may be appealed without any supersedeas bond. Here, however, the claimant is being deprived of that important right because of its impecunious state.
>
> To my mind the egregiousness of the result is magnified because this is a forfeiture case — a penal proceeding wherein strict construction of authorizing statutes have been required almost as long as construction itself. . . . Forfeiture actions are unique in that they are the only proceedings where the government may confiscate private property on a mere showing of probable cause. For this court to eliminate the right of appeal, the most important safeguard against abuse, is indeed a drastic step.

836 F.2d at 1578 (citation omitted).

Appeals of forfeiture judgments should be available to all parties regardless of their financial resources.

2. *Parties who can afford a bond must act almost as soon as the judgment is entered or lose their right to appeal.*

If, as the Government argues, a stay is necessary in order to appeal, parties who can afford to appeal will no longer have thirty days from the final judgment to decide whether to appeal as specified in Fed.R.App.P. 4(a). Rather, such parties will have to obtain a stay by the tenth day after entry of judgment, or the ability to appeal will be lost.

It is unrealistic to assume that district courts will routinely enter a stay in the ten days between entry of the final judgment and the expiration of the automatic stay provided in Fed.R.Civ.P. 62(a). For example, in *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983), more

than ten days elapsed after entry of judgment, and the district court ordered disbursement of the funds from the court registry. The court denied an emergency motion to prevent disbursement pending an appeal. The funds were disbursed, and the Eleventh Circuit dismissed the appeal for lack of jurisdiction.

It is also unfair and unwise to require a losing litigant objectively to decide whether an appeal is warranted in such a short time. Time is often needed to review the final judgment, analyze the record and reflect on the case before deciding whether to appeal. *See, e.g.*, Fed.R.App.P. 4(a)(5) (providing for additional time beyond 30 days to file a notice of appeal). The Government's proposed rule, which unnecessarily shortens the time to take an appeal, should not be adopted.

3. *In order to extend the ten day automatic stay, emergency motions for stay relief must be both filed and granted by already overburdened federal courts.*

Even if one were to assume that a district court, or an appellate court, on an emergency basis, will grant a stay within ten days of the entry of a final judgment, a rule which requires a stay in every civil forfeiture case will substantially and unnecessarily add to the work of already overburdened federal trial and appellate courts. Civil forfeiture actions are a major weapon of the United States in its war on drugs. From 1985 to 1990,[4] the Government confiscated money and goods worth approximately $1.5 billion, with the fate of another $1.3 billion still undecided. *United States v. $12,390.00*, 956 F. 2d 801, 807 n.6 (8th Cir. 1992) (Beam, J. dissenting in part). In 1990, the government expected to forfeit property worth $700 million. The total value of forfeited cash and property represents a growth in asset forfeitures of over 1,500 percent since 1985. *Id.* In 1990, of the 31,763 federal civil cases commenced by the Government, 6,019, or approximately 20%, were forfeiture or penalty cases. Table C2, Administrative Offices of the U.S. Courts, Analysis and Reports Board, Statistics Division. With this avalanche of cases, the

[4] 1990 is the last year in which statistics are available.

burden of ruling on stay motions, emergency appeals from those rulings, and rulings on motions to dismiss appeals, will grow exponentially.

4. *The Government does not need the protection of a bond.*

Requiring a claimant to post a bond to appeal a civil forfeiture judgment is anathema to the rationale underlying the supersedeas bond concept. In admiralty cases, the bond requirement protects the prevailing party by assuring that, pending appeal, the ship will not "stealthily abscond from port." *United States v. $95,945.18*, 913 F.2d 1106, 1109 (4th Cir. 1990). By contrast, in civil forfeiture cases,

> the defendant *res* is in the possession of the United States and thus in no danger of disappearing.... Having prevailed below, the government, if it wins on appeal, is assured of execution regardless of whether [the claimant] files a bond or stays execution of the judgment.

Id. (brackets added).

The Government does not need the protection of a bond in a civil forfeiture case. What the Government seeks, by proposing the "no *res* no jurisdiction" rule, *United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417, 1419 (1st Cir. 1991), is to destroy the appellate rights of parties. The bond concept should not be made into a weapon to defeat the remedial purpose for which it was originally established.

CONCLUSION

This Court should vacate the judgment below, and order the appellate court below to reinstate Republic's appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals lacks jurisdiction over an appeal from an *in rem* forfeiture proceeding after the proceeds of the sale of the *res* have been released from the district court's control and deposited in the United States Treasury.

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In the Supreme Court of the United States

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No. 91-767

REPUBLIC NATIONAL BANK OF MIAMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9; J.A. 29-37) is reported at 932 F.2d 1433. The opinion of the district court (Pet. App. A10-A29; J.A. 5-24) is reported at 731 F. Supp. 1563.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1991. A petition for rehearing was denied on August 7, 1991. J.A. 38-39. The petition for a writ of certiorari was filed on October 31, 1991, and was granted on February 24, 1992. Petitioner invoked the jurisdiction of this Court under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, § 9, Cl. 7, and Art. III, § 2, of the Constitution; 21 U.S.C. 881; 28 U.S.C. 524(c); Federal Rule of Civil Procedure 62; and Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims are reprinted at App., *infra*, 1a-31a.

STATEMENT

1. In February 1988, the United States filed an *in rem* action in the United States District Court for the Southern District of Florida, seeking forfeiture of a single family residence at 6960 Miraflores Avenue in Coral Gables, Florida. The complaint alleged that Indalecio Iglesias was the true owner of the property and that Iglesias had purchased the property with the proceeds of narcotics trafficking. On February 26, 1988, a warrant to arrest the property was issued. On March 7, 1988, the United States Marshal seized the property. J.A. 6, 26.

In response to the complaint, Thule Holding Corporation, a Panamanian shell corporation, filed a claim stating that it was the owner of the Miraflores Avenue residence. Petitioner also filed a claim asserting an $800,000 lien interest in the property pursuant to a mortgage recorded on September 30, 1987. Thule subsequently withdrew its claim and consented to forfeiture of the property. At the government's request, petitioner agreed to an interlocutory sale of the property. On June 1, 1988, the residence was sold for $1,050,000, and the proceeds were retained by the Marshal pending disposition of the case. J.A. 6 & n.2, 8.

2. The evidence at trial showed that on December 10, 1980, Iglesias was arrested by the Customs Service

on board a Colombian vessel containing 300 pounds of marijuana. In April 1981, Bahamian officials arrested Iglesias for possession of 3,000 pounds of marijuana and fined him $10,000. In addition, a DEA agent presented information obtained from confidential informants that Iglesias imported approximately 30,000 kilograms of cocaine into the United States from Colombia between 1980 and 1985. An informant estimated that Iglesias made $180 million in profits from drug trafficking. J.A. 7-8.

Iglesias, acting through Thule, purchased a lot and partially-constructed residence at 6960 Miraflores Avenue in 1983. To complete construction of the residence, Iglesias paid a contractor a total of between $200,000 and $220,000 in cash installments of $7,000 to $9,000. Iglesias paid a second contractor $140,000, mostly in cash. After the residence was completed, Iglesias and his family lived there. J.A. 8.

In August 1987, Iglesias learned that the IRS had begun an investigation of him and the Miraflores Avenue property. Iglesias immediately put the house up for sale and approached Miami lenders to secure a mortgage on the property. Petitioner was approached by Ramon Puentes, who claimed that he and a partner owned the property. That claim was contradicted by documents submitted to petitioner in support of the loan request, which showed that Thule owned the property and that Thule's stock was wholly owned by Antonio Munoz Caballero. J.A. 9, 19.

Petitioner nevertheless agreed to provide an $800,000 one-year "balloon" note on the property, which was appraised at $1.2 million. The loan was approved quickly, outside of petitioner's normal lending channels. Petitioner did not ask the purpose of the loan, investigate Thule (the corporate borrower), or con-

duct a title search of the property. When the loan was approved, the residence was vacant. Puentes used some of the proceeds of the loan to buy expensive gifts for the family of petitioner's president, who was personally involved in approving the loan. Puentes also used some of the proceeds of the loan to purchase an airplane ticket to Switzerland for Iglesias. Petitioner transferred most of the proceeds of the loan to Iglesias's Swiss bank account. Iglesias fled the United States shortly after this transaction. J.A. 9, 18-19.[1]

The district court ordered petitioner's interest in the property forfeited. J.A. 5-28. The court found that there was probable cause to believe that "Iglesias bought the Miraflores property and constructed the residence with drug profits, and then laundered the money through [petitioner's] mortgage into his Swiss bank account." J.A. 11. The court held that petitioner was entitled to assert an innocent owner defense to the seizure of the property, but that petitioner was not an innocent owner.[2] In particular, the court found that the borrower was a Panamanian shell corporation unknown to petitioner; that the borrower's principal asset was a vacant residence that was for sale when the loan was made; that the borrower had no business and could not demonstrate how the loan was to be repaid; that petitioner structured

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[1] While the forfeiture action was pending, Iglesias was indicted in the Southern District of Florida on narcotics charges. J.A. 30-31.

[2] The government argued that the relation back doctrine precluded petitioner from raising an innocent owner defense. See J.A. 11-16. That doctrine is before the Court in *United States* v. *A Parcel of Land, etc.*, cert. granted, No. 91-781 (Mar. 2, 1992).

the loan in an unusual fashion and did not establish a repayment schedule for the loan; that the bank did not inquire why a loan was necessary if the property was about to be sold; that once the loan was approved, Puentes gave a $3,000 vacation trip to members of the family of petitioner's president; and that petitioner transferred the proceeds of the loan to a Swiss account. J.A. 18-20.

3. On March 15, 1990, the district court issued a final judgment of forfeiture. J.A. 25-28. Petitioner filed a notice of appeal, but did not post a supersedeas bond or file a motion to stay execution of the judgment. Accordingly, on April 20, 1990, the United States Marshal transferred the proceeds from the sale of the house to the United States Treasury. J.A. 29.

4. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. J.A. 29-37. Relying on its *en banc* decision in *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.), cert. denied, 487 U.S. 1204 (1988), the court held that removal of the proceeds of the sale of the house from the jurisdiction of the district court terminated the court's *in rem* jurisdiction. J.A. 32-34. The court explained that "[w]here an appellant fails to file a stay of judgment or a supersedeas bond, and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction." J.A. 33 (quoting *One Lear Jet*, 836 F.2d at 1573).

The court also rejected petitioner's argument that the court had *in personam* jurisdiction because the government had served petitioner with the complaint of forfeiture. The court noted that the defendant in an *in rem* action is the property itself, and held that "the government did not consent to the court's *in personam* jurisdiction * * * merely by notifying poten-

tial claimants that an *in rem* action has commenced." J.A. 35. The court observed that the government was not required to serve petitioner with a copy of the complaint, but had done so as a courtesy. J.A. 34-35 (citing Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C).

Finally, the court held that the government was not estopped from contesting the jurisdiction of the court of appeals based on its agreement that the United States Marshal would retain the proceeds of the sale pending the district court's order. J.A. 36-37. The district court entered a final judgment of forfeiture that required the United States to dispose of the proceeds of the sale according to law. The government's execution of the unstayed judgment was therefore proper.

SUMMARY OF ARGUMENT

A civil forfeiture proceeding under 21 U.S.C. 881 is an *in rem* action. The defendant in an *in rem* action is a vessel or other property—the "*res*." Accordingly, it has long been recognized that *in rem* jurisdiction depends on the court's control of the *res*. That historic principle has been reaffirmed many times by this Court, and is reflected in the special procedural rules Congress has made applicable to actions *in rem*.

It is equally well settled that if the court releases the *res* from its custody, the court ceases to have *in rem* jurisdiction. Although this Court has recognized an exception to that rule in cases where removal of the *res* is fraudulent or otherwise improper, the general rule remains valid and is applied regularly in both forfeiture proceedings and other types of *in rem* actions.

In this case, the district court entered judgment in favor of the government. The claimant simply failed to post a supersedeas bond or seek a stay of the judgment. The government's removal of the *res* from the district was therefore entirely proper. Because the court no longer has control of the *res*, it lacks jurisdiction to consider an appeal from the district court's judgment in this *in rem* action.

Petitioner's arguments that the court of appeals retains jurisdiction despite the absence of the *res* are unpersuasive. Congress has expressly provided that the rules applicable to admiralty *in rem* proceedings shall apply in civil forfeiture proceedings. 28 U.S.C. 2461(b); 21 U.S.C. 881(b). Petitioner's contention that *in rem* principles derived from the law of admiralty should not govern forfeiture proceedings is accordingly properly addressed to Congress, not this Court. Moreover, Congress is presumed to have retained long-established legal principles unless a statutory purpose to the contrary is evident. Congress has made clear that it intends traditional principles of *in rem* jurisdiction to apply in forfeiture proceedings unless those principles are expressly modified by statute. Even if this Court has authority to expand the limited jurisdiction of federal courts by modifying traditional *in rem* principles, it would be unwise to do so where Congress has legislated on the assumption that the traditional rules will apply unless altered by statute.

Any departure from the established rule grounding *in rem* jurisdiction on a federal court's continuing control over the *res* would raise serious constitutional concerns. First, the court's ability to grant relief in an *in rem* action depends upon its ability to control the disposition of the *res*. Once the *res* is beyond the

court's control it cannot grant *in rem* relief, and accordingly there is no longer a live controversy before the Court. As with mootness, standing, and other aspects of the Article III case or controversy requirement, the requirement that the court have the ability to grant relief through control of the *res* must be satisfied at each stage of the litigation.

Second, petitioner's appeal in this case is barred because a judgment in its favor would require payment of money from the Treasury without statutory authorization, in violation of the Appropriations Clause. That Clause specifies in unambiguous terms that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, Cl. 7. A court in an *in rem* proceeding can order the return of the *res* to a prevailing owner without implicating this Clause, because the *res* is under the jurisdiction of the court. When, however, the *res* has been converted into money and deposited into the Treasury—because a losing claimant failed to stay an adverse judgment—the plain language of the Appropriations Clause precludes drawing money from the Treasury in the absence of an "Appropriation[] made by Law." Congress has authorized payment from the Assets Forfeiture Fund of the expenses of the seizure and sale of the property, payments to informants, and certain administrative payments to claimants at the discretion of the Attorney General. But because no statute authorizes the payment of a judgment to petitioner from the Treasury in this *in rem* case, petitioner cannot pursue an appeal.

Petitioner is incorrect in arguing that the United States submits to the court's *in personam* jurisdiction by bringing an *in rem* action. The distinction between

in rem and *in personam* jurisdiction turns on the substantive nature of the claim, not on whether the participants have invoked the aid of the court. In any event, Congress has not provided that the United States is subject to the court's *in personam* jurisdiction simply because it invoked the court's *in rem* jurisdiction, and accordingly principles of sovereign immunity prevent the court from exercising jurisdiction over the government on appeal. See *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1017 (1992).

Petitioner's effort to ground jurisdiction on Fed. R. App. P. 3(a) and 21 U.S.C. 881(j) is also misplaced. It is elementary that the Federal Rules do not confer jurisdiction. See Fed. R. App. P. 1(b). And Section 881(j), by its own terms, does not apply to petitioner because no criminal prosecution was pending when the forfeiture proceeding was brought. In any event, the venue provisions of Section 881(j) are just that—venue provisions. They do not confer jurisdiction.

Nor is applying the established rules of *in rem* jurisdiction unfair to losing claimants in civil forfeiture proceedings. Under the Federal Rules of Civil Procedure, a losing claimant is automatically entitled to a 10-day stay of a judgment of forfeiture. In addition, a claimant is entitled to obtain an automatic stay pending appeal by posting a supersedeas bond. And a claimant who is unable to post a bond may seek a stay from the district court or the court of appeals.

ARGUMENT

REMOVAL OF THE *RES* FROM THE CONTROL OF THE DISTRICT COURT DEPRIVES THE COURT OF APPEALS OF JURISDICTION IN AN *IN REM* ACTION.

A. In Rem *Jurisdiction Rests on Judicial Control of the Res.*

1. A civil forfeiture proceeding under 21 U.S.C. 881 is an action *in rem*. See *United States* v. *$84,740 U.S. Currency*, 900 F.2d 1402, 1404 (9th Cir. 1990); *United States* v. *United States Currency in the Amount of $2,857*, 754 F.2d 208, 212 (7th Cir. 1985). Section 881(b) expressly provides that "[a]ny property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property." 21 U.S.C. 881(b). In addition, 28 U.S.C. 2461(b) provides:

> Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

Although *in rem* actions are not the norm in our legal system, *in rem* forfeiture proceedings are an established feature of the legal landscape. "Long

before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (quoting *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 139 (1943)). Congress enacted statutes providing for *in rem* forfeitures "almost immediately after adoption of the Constitution," *Calero-Toledo*, 416 U.S. at 683, and several of this Court's earliest decisions concerning *in rem* jurisdiction arose from forfeiture proceedings. See *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844). Indeed, the Court has suggested that *in rem* forfeiture proceedings have an even more ancient lineage, deriving from the medieval doctrine that "the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand." *Calero-Toledo*, 416 U.S. at 680-681. See *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719-720 (1971); O.W. Holmes, *The Common Law* 23-31 (M. Howe ed. 1963). In any event, "[t]he enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Calero-Toledo*, 416 U.S. at 683. The Court has recognized that *in rem* forfeiture proceedings serve valid purposes, "both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Id.* at 687.

The "distinguishing and characteristic" feature of an *in rem* action is that the defendant is a *res*—a

vessel or other property—rather than a person. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1867). See *Madruga* v. *Superior Court*, 346 U.S. 556, 560 (1954); *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 224 (1945) ("personification of the vessel, treating it as a juristic person, * * * has long been recognized by this Court"); *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U.S. 303, 306-307 (1915); *The "Sabine"*, 101 U.S. 384, 388 (1880); G. Gilmore & C. Black, *The Law of Admiralty* § 1-12, at 36 (2d ed. 1975) (suit *in rem*—"against the thing" —is "a direct proceeding against the vessel or other property"). Because the *res* is the defendant in an *in rem* action, it has long been settled that the court must control the *res* in order to exercise *in rem* jurisdiction. In *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815), the Court held that "[i]n order to institute *and perfect* proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the court." *Id.* at 290 (emphasis added). The Court explained that the *res* "is actually within [the court's] possession, when it is submitted to the process of the court; it is constructively so, when, by a seizure, it is held, to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*." *Ibid.* Similarly, in *United States* v. *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612), Chief Justice Marshall held that "possession of the thing is necessary as a foundation for the jurisdiction of the court" in an *in rem* action. He explained that "in proceedings in rem, the vested jurisdiction of the court could be divested by the loss of the thing," because "as the thing could neither be delivered to the [plaintiffs], nor restored to the claimants, the sentence would be

useless, and courts will not render judgments which can operate on nothing." *Ibid.*

This Court has repeatedly reaffirmed the principle that jurisdiction in an *in rem* proceeding rests on the court's control of the *res*. In *Taylor* v. *Carryl*, 61 U.S. (20 How.) 583, 599 (1858), for example, the Court held that "to give jurisdiction *in rem*, there must have been a valid seizure and an actual control of the ship by the marshal of the court." In *The Propeller Commerce*, 66 U.S. (1 Black) 574, 580-581 (1862), the Court explained:

> Process *in rem* is founded on a right in the thing, and the object of the process is to obtain the thing itself, or a satisfaction out of it * * *. Consequently, the court, through its process, arrests the thing, and holds possession of it by its officers, as the means of affording such satisfaction * * *. Unless * * * the suit *in rem* can be prosecuted in the district where the property is found, it cannot be prosecuted at all.

In *The Resolute*, 168 U.S. 437, 439 (1897), the Court explained that "[j]urisdiction is the power to adjudicate a case upon the merits. * * * As applied to a suit *in rem* * * * it presupposes * * * that the property proceeded against is within the lawful custody of the court." In *United States* v. *Mack*, 295 U.S. 480, 484 (1935), Justice Cardozo, relying on *The Brig Ann*, stated that "[o]ne of the essentials of jurisdiction *in rem* is that the thing shall be 'actually or constructively within the reach of the court.'" Most recently, in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984)—a forfeiture proceeding—the Court again reaffirmed that in actions *in rem*, "jurisdiction [is] dependent upon seizure of a physical object."

2. Because the court's jurisdiction in an *in rem* action is based on its control of the *res*, it has long been settled that release of the *res* generally deprives the court of jurisdiction. This Court recognized that principle in *The Brig Ann, supra.* In that case, United States customs officials seized a British merchant ship and instituted an *in rem* forfeiture proceeding against the vessel and her cargo. Several days after the seizure, however, government officials voluntarily released the ship. Justice Story's opinion for the Court held that the release of the *res* terminated the court's *in rem* jurisdiction. Construing the jurisdictional provisions of the Judiciary Act of 1789, the Court ruled that "[i]n order to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the court." 13 U.S. (9 Cranch) at 291. Justice Story explained that "[i]f the place of committing the offence had fixed the judicial *forum*, * * * the law would have been, in numerous cases, evaded; for, by a removal of the thing from such place, the court could have had no power to enforce its decree." The Court therefore ruled that

> [i]f a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings; and it can be revived only by a new seizure. * * *

Ibid. The Court expressly reserved the question whether "a tortious ouster of possession, or fraudulent rescue * * * will divest the [court of] jurisdiction." *Ibid.*

Petitioner contends (Pet. Br. 7-8) that this Court implicitly rejected the rule of *The Brig Ann* in two

subsequent decisions, *The Rio Grande*, 90 U.S. (23 Wall.) 458 (1875), and *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960). Contrary to petitioner's contentions, however, those decisions did not jettison the firmly established general rule that judicial control of the *res* is a prerequisite to the exercise of *in rem* jurisdiction. That rule retains its vitality and continues to be applied by the federal courts in *in rem* actions.[3]

In *The Rio Grande*, the Court addressed the question reserved in *The Brig Ann*: whether a fraudulent or improper removal of the *res* deprives the court of jurisdiction. In *The Rio Grande*, an *in rem* action was brought in federal district court in Alabama against a vessel for the cost of repairs. The district court entered judgment for the vessel; the plaintiffs

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[3] See, *e.g.*, *United States* v. *$29,959 U.S. Currency*, 931 F.2d 549, 551 (9th Cir. 1991); *United States* v. *Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989); *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988); *United States* v. *$79,000 in U.S. Currency*, 801 F.2d 738, 739 (5th Cir. 1986); *United States* v. *66 Pieces of Jade & Gold Jewelry*, 760 F.2d 970, 973 (9th Cir. 1985); *L.B. Harvey Marine, Inc.* v. *M/V "River Arc"*, 712 F.2d 458 (11th Cir. 1983); *Taylor* v. *Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir. 1982); *Bank of New Orleans & Trust Co.* v. *Marine Credit Corp.*, 583 F.2d 1063 (8thh Cir. 1978); *American Bank of Wage Claims* v. *Registry of the District Court of Guam*, 431 F.2d 1215, 1218-1219 (9th Cir. 1970); *Parks* v. *B.F. Leaman & Sons, Inc.*, 279 F.2d 529, 532 (5th Cir. 1960). But see *United States* v. *$12,390*, 956 F.2d 801 (8th Cir. 1992); *United States* v. *One Lot of 25,721 in Currency*, 938 F.2d 1417, 1419 (1st Cir. 1991); *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991) (declining to apply traditional rule where the *res* is money); *United States* v. *$95,945.18*, 913 F.2d 1106 (4th Cir. 1990); *United States* v. *Aiello*, 912 F.2d 4 (2d Cir. 1990), cert. denied, 111 S. Ct. 757 (1991).

took the necessary steps (including the posting of supersedeas bonds) to perfect an appeal. Due to a clerical error, however, the United States Marshal, who had custody of the ship, released it to its owners, who "immediately * * * went off with her." 90 U.S. (23 Wall.) at 461. The circuit court nevertheless heard the appeal and entered judgment for the plaintiffs. The plaintiffs soon learned that the vessel was in New Orleans, where they had the vessel arrested for a second time. The Court held that the circuit court in Alabama had jurisdiction over the appeal, because "a valid seizure and actual control of the *res* by the marshal gives jurisdiction of the subject-matter, and * * * an accidental or fraudulent or improper removal of it from his custody * * * does not destroy jurisdiction." *Id.* at 465.

The Court's decision in *The Rio Grande* recognized an exception to the general rules of *in rem* jurisdiction that applies when the *res* is accidentally or fraudulently removed from the court's control. In recognizing that exception, the Court did not imply that it was rejecting the general rule that jurisdiction in an *in rem* action rests on the court's continuing control of the *res*. On the contrary, the Court noted that the narrow question presented in *The Rio Grande* had been expressly reserved in *The Brig Ann*, and reaffirmed the holding of *The Brig Ann* that "the legal effect" of "a voluntary abandonment and release of the property seized [is] to purge away all the prior rights acquired by the seizure." 90 U.S. (23 Wall.) at 464 (quoting 13 U.S. (9 Cranch) at 291).[4] Because the government's removal of the *res*

[4] Justice Hunt's opinion for the Court in *The Rio Grande* erroneously attributes the Court's opinion in *The Brig Ann* to Chief Justice Marshall. See 90 U.S. (23 Wall.) at 464.

in this case was not accidental, fraudulent, or otherwise improper, J.A. 37, *The Rio Grande* does not support petitioner's position.

The Court's decision in *Continental Grain Co.* v. *Barge FBL-585*, *supra*, also provides no support for petitioner. In that case, a cargo owner filed a single action asserting essentially identical claims against a vessel *in rem* and against the vessel's owner *in personam*. The Court held that the entire action could be transferred from a district court in Louisiana to a district court in Tennessee under the *forum non conveniens* statute, 28 U.S.C. 1404(a). As the case came to the Court, it was undisputed that a transfer was in the interest of justice, and that the vessel owner was subject to suit *in personam* in the Tennessee court. The Court rejected the argument that the *in rem* claim could not be transferred to Tennessee because the vessel was located in Louisiana at the time the action was filed. The Court acknowledged the "long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment." 364 U.S. at 22-23. The Court noted, however, that "[t]he fiction * * * has not been without its critics," and declined to "transplant" the fiction to the "context of *forum non conveniens*." [5] *Id.* at 23. The Court based its decision

[5] The Court noted that a lower court opinion had referred to the fiction that a vessel is a person as " 'archaic,' 'an animistic survival from remote times,' 'irrational' and 'atavistic.' " 364 U.S. at 23 (quoting *The Carlotta*, 48 F.2d 110, 112 (2d Cir. 1931)). But the Court commented that this criticism "[p]erhaps is going too far," because "[a] purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still." 364 U.S. at 23.

on its conclusion that the *in rem* and *in personam* claims were "inseparable parts of one single 'civil action.'" *Id.* at 27. The Court observed that "the grain company's suit against the barge and its suit against the owner are in the same complaint for the loss of the same cargo in the same sinking of the same barge producing the same damages. * * * The crucial issues about fault and damages suffered were identical, whether considered as a claim against the ship or its owner." *Id.* at 22, 26.

The Court's decision in *Continental Grain* did not purport to overrule the established principle that the presence of the *res* is a jurisdictional prerequisite in *in rem* actions. Instead, the Court declined to apply that rule expansively, in a case that involved overlapping *in rem* and *in personam* claims, to defeat the purpose of the *forum non conveniens* statute. This case, unlike *Continental Grain*, involves only an *in rem* claim. Because forfeiture proceedings, by long tradition, are actions *in rem*, this case presents no question of "transplanting" *in rem* jurisdictional principles to a novel context. In *Continental Grain*, moreover, a court retained control over the *res* throughout the proceedings, and the vessel owner consented to the transfer and agreed to pay any judgment rendered against the vessel. See 364 U.S. at 27 (opinion of Frankfurter, J.). In this case, in contrast, no court has control over the *res*, and the United States has not consented—and, in the absence of an appropriation by Congress, could not consent, see pages 30-34, *infra*—to pay petitioner's claim from the Treasury if petitioner were to succeed on appeal.[6]

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[6] There is no basis for petitioner's contention (Pet. Br. 14-16) that the ordinary rules of *in rem* jurisdiction do not apply if the *res* at issue is money rather than tangible property. It is common practice in *in rem* proceedings to substitute money

3. "[W]here a common-law principle is well established, * * * the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991) (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)). See also *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986). As we have shown, the general rule that *in rem* jurisdiction rests on the court's continued control of the *res* is a firmly established legal principle. Congress's forfeiture statutes not only fail to evince a purpose to reject that rule, they reinforce the conclusion that Congress intended the rule to apply unless altered by statute.

For example, the provision of the Judiciary Act of 1789 construed in *The Brig Ann* conferred on the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made * * * within their respective districts as well as upon the high seas." Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77. See 13 U.S. (9 Cranch) at 291. Thus, as early as the First Judiciary Act, Congress recognized that

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for a tangible *res*. See *American Bank of Wage Claims* v. *Registry of the District Court of Guam*, 431 F.2d 1215, 1218 (9th Cir. 1970). Although money is fungible, the court's *in rem* jurisdiction is not destroyed, nor is the action transformed into an *in personam* proceeding. See *United States* v. *$57,480.05 U.S. Currency & Other Coins*, 722 F.2d 1457, 1459 (9th Cir.) ("It does not follow * * * that once the substitute funds are disbursed pursuant to the judgment of the court, the court retains power to re-create the *res* if the judgment is reversed. The rule is quite the contrary."), cert. denied, 469 U.S. 916 (1984).

a district court's *in rem* jurisdiction depended on seizure of the *res* "within [the] district." Similarly, in 1819 Congress passed a statute providing that any vessel used in "any piratical aggression * * * shall be captured and brought into any port of the United States" and forfeited after a trial "in any court having admiralty jurisdiction, which shall be holden for the district into which the captured vessel shall be brought." Act of Mar. 3, 1819, ch. 77, § 4, 3 Stat. 513. See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 7-8 (1827).

Petitioner contends (Pet. Br. 8) that "whatever continued validity the 'ship personification' fiction may have in admiralty law, the Government's attempt to apply it, as a rationale to dismiss appeals in civil forfeiture cases, should be rejected." But as we have explained, p. 10, *supra*, Congress has expressly provided that the rules applicable to admiralty *in rem* actions shall apply in forfeiture proceedings, and has modified those procedures when it saw fit to do so. See 28 U.S.C. 2461(b); 21 U.S.C. 881(b).[7] Accordingly, petitioner's contention is properly addressed to Congress rather than to this Court.

Admiralty rules have long reflected the basic principle that judicial control of the *res* is a jurisdictional prerequisite to the maintenance of an action *in rem*. The 1844 rules of practice in admiralty and maritime cases required that an *in rem* action be

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[7] Earlier forfeiture statutes likewise applied the procedural rules of admiralty *in rem* proceedings. See, *e.g.*, Act of July 17, 1862, ch. 195, § 7, 12 Stat. 587, 591 ("proceedings in rem shall be instituted in the name of the United States * * * which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases."). See *Knote* v. *United States*, 95 U.S. 149 (1877).

initiated by arrest of "ship, goods, or other thing to be arrested" (Rule IX), and that a libel initiating a forfeiture action "state the place of seizure" (Rule XXII). See *Miller* v. *United States*, 78 U.S. (11 Wall.) 268, 294 (1871). The 1920 Admiralty Rules, which replaced the 1844 rules, were to the same effect. See Rules 10, 21; *Ex parte Peru*, 318 U.S. 578, 587 (1943).[8]

The current version of the special rules applicable to *in rem* proceedings is set out in the Supplemental Rules for Certain Admiralty and Maritime Claims. Supplemental Rule C(2) provides that the complaint in an *in rem* action

> shall describe * * * the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of [the] seizure.

Rule C(3) provides:

> In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property.

In addition, Supplemental Rule E(3) limits service of process in *in rem* actions to the district where the action is commenced. Rule E(4)(b) provides that "[i]f tangible property is to be * * * arrested, the marshal shall take it into the marshal's possession for safe custody," or if taking actual possession

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[8] The Admiralty Rules of 1844 and 1920 are set out in 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .30, at 229, 236 (2d ed. 1988).

of the property is impracticable, "shall * * * affix[] a copy [of the process] in a conspicuous place." "If intangible property is to be * * * arrested," the marshal is required to serve the process on the obligor. *Ibid.* Under Supplemental Rule E(5)(a), the owner of the *res* generally may obtain the release of the property by posting a bond "sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs." The bond serves as a substitute for the vessel or other *res.* See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 10 (1827); *The "Wanata"*, 95 U.S. 600, 611 (1877); G. Gilmore & C. Black, *supra*, § 9-89, at 799.[9] Finally, Rule E(8) provides that a claimant may enter a restricted appearance to defend against an *in rem* claim, and that such an appearance "shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served."

Each of these rules reflects the underlying principle that the defendant in an *in rem* action is the *res*, and that therefore the court's *in rem* jurisdiction depends on its continuing control of the *res.* For example, if the court were not required to exert control over the *res*, it would not be necessary to ascertain that the property was within the district, nor would it be necessary to "arrest" the *res.* And if continuing judicial control were not necessary to support jurisdiction, the owner of the *res* would not be required to post a bond as a substitute *res* to obtain release of the *res.*

When Congress has sought to make an exception to the traditional rule that continuing control of the

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[9] A claimant in a forfeiture proceeding is not entitled to obtain release of the property by posting a bond. Rule E(5)(a).

res is a prerequisite to *in rem* jurisdiction, it has done so expressly. For example, the Federal Food, Drug, and Cosmetic Act provides that proceedings for the forfeiture of adulterated or misbranded foods, drugs, and cosmetics must be commenced "in any district court * * * within the jurisdiction of which the article is found." 21 U.S.C. 334(a). This is the traditional rule. The statute goes on to provide, however, that a forfeiture action may be moved to a different district in certain circumstances. *Ibid.*

Similarly, the customs laws have long provided that items seized under those laws "shall be placed and remain in the custody of the appropriate customs officer *for the district in which the seizure was made* to await disposition according to law." 19 U.S.C. 1605 (emphasis added). This reflects the historic rule linking jurisdiction to seizure and custody of the *res* in the district. Section 1605 was amended in 1954, however, to provide that

> [p]ending such disposition, the property shall be stored in such place as, in the customs officer's opinion, is most convenient and appropriate with due regard to the expense involved, whether or not such place of storage is within the judicial district or the customs collection district in which the property was seized; and storage of the property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such property.

The legislative history of the amendment cites *The Brig Ann* and *The Rio Grande* for the rule that seized items must "remain in the judicial district of seizure in order that the district court may have jurisdiction

when condemnation proceedings are instituted." S. Rep. No. 2326, 83d Cong., 2d Sess. 7 (1954). Congress plainly understood that, in light of the traditional rule, express legislative alteration of that rule was necessary if the district courts were to retain jurisdiction after transfer of the seized items. *Ibid.*; H.R. Rep. No. 2453, 83d Cong., 2d Sess. 10-11 (1954). If petitioner's view of the law is correct, Congress's understanding was quite wrong, and its amendment was wholly gratuitous. See *One Lear Jet*, 836 F.2d at 1575.

Similarly, 21 U.S.C. 881—the forfeiture statute at issue in this case—provides that "[w]henever property is seized under any of the provisions of the subchapter, the Attorney General may * * * remove the property to a place designated by him." 21 U.S.C. 881(c)(2). Again, if petitioner's view of the law is correct, that provision was unnecessary, because the property could be removed from the district without depriving the court of jurisdiction.[10] The legislative history of the 1984 amendments to 21 U.S.C. 881 clearly indicates that Congress understood that such provisions are necessary to modify the traditional rules of *in rem* jurisdiction.

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[10] Petitioner did not argue below and does not contend here that 21 U.S.C. 881(c) confers jurisdiction on the court of appeals after the *res* has left the court's control. In any event, Section 881(c) has no such effect. That provision grants custody of the *res* to the Attorney General "subject * * * to the orders and decrees of the court or the official having jurisdiction thereof," and provides for "disposition [of the property] in accordance with law." 21 U.S.C. 881(c). In this case, the district court entered a final judgment of forfeiture, and the property was disposed of in accordance with law by being deposited in the United States Treasury. Consequently, the court no longer has control of the *res* or jurisdiction.

> A civil forfeiture is commenced by the government's seizure of the asset. * * * Since civil forfeiture is an *in rem* proceeding, the forfeiture case must be brought in the judicial district in which the property is located. The property is the defendant in the case.

S. Rep. No. 225, 98th Cong., 2d Sess. 193 (1984).

In addition, Congress is considering legislation that would preserve the court's jurisdiction in civil forfeiture cases after the removal of the *res*. On November 21, 1991, the Senate passed S.543, which provides in part as follows:

> In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the prevailing party to post an appeal bond.

See 137 Cong. Rec. S17,482-17,483 (daily ed.); *id.* at S16,643 (daily ed. Nov. 13, 1991). The House of Representatives failed to pass this legislation before Congress adjourned in the fall of 1991, but it is currently pending in identical form as part of S.1665. Again, Congress would have no reason to consider such legislation if it did not regard the continuing presence of the *res* as a prerequisite to jurisdiction,

just as it did in 1954 when it amended 19 U.S.C. 1605.[11]

It bears repeating that the rule at issue in this case is a rule of jurisdiction. Federal courts are courts of limited jurisdiction; they have only such jurisdiction as is authorized by Article III of the Constitution and the statutes enacted by Congress. Those who invoke the jurisdiction of a federal court—including a federal appellate court—have the burden of establishing it. See *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). The effect of a decision in petitioner's favor would be to expand the scope of federal jurisdiction in forfeiture proceedings by cutting the court's jurisdiction loose from its traditional *in rem* moorings. Even if this Court has power to expand federal jurisdiction by modifying long established jurisdictional rules, it would be unwise to exercise that power. Congress has legislated in this area on the assumption that the traditional jurisdictional rules are valid. Accordingly, any change in the jurisdictional rules should be made by Congress rather than this Court. Cf. *Omni Capital Int'l, Ltd.* v. *Rudolph Wolff & Co.*, 484 U.S. 97, 108-109 (1987) (concluding that it is unclear whether

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[11] In contrast to civil forfeitures under 21 U.S.C. 881, Congress has expressly provided that in criminal forfeiture proceedings under 21 U.S.C. 853, "[t]he district courts of the United States shall have jurisdiction to enter orders * * * without regard to the location of any property which may be subject to forfeiture under this section." 21 U.S.C. 853(*l*). The absence of any corresponding provision in 21 U.S.C. 881 (which was amended at the same time that Congress enacted 21 U.S.C. 853(*l*)), reinforces the conclusion Congress did not intend to alter the traditional principle that *in rem* jurisdiction in civil forfeiture proceedings rests on continued control of the *res*.

Court has authority to alter rules authorizing service of process, but that in any event it would be unwise to do so where Congress has assumed that the courts lack such authority).

4. a. Any departure from traditional principles of *in rem* jurisdiction would raise serious concerns under Article III of the Constitution. The traditional rule requiring that the court in an *in rem* action retain control over the *res* to retain jurisdiction ensures that the court will be able to enforce a subsequent judgment. The relief that a court orders in an *in rem* action is disposition of the *res*; once the court loses control of the *res*, it *ipso facto* loses its ability to order relief. In historic admiralty terms, once the ship has sailed from port, the court can no longer control the disposition of the ship. Any suggestion that the court can afford relief apart from disposition of the *res* obliterates the distinction between *in rem* and *in personam* actions. Here, the court cannot order the United States to pay petitioner money, because—quite apart from sovereign immunity and Appropriations Clause concerns, see pp. 30-34, 36-38, *infra*—this is not an *in personam* action. The court, when it controlled the *res*, *could* order appropriate disposition of the *res*—*i.e.*, the money—but it lost its ability to do so when the *res* left the court's control.

In this respect the traditional rule implicates the same sort of Article III case or controversy concerns underlying mootness principles. See *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988). A ruling by the court of appeals that the *res* be turned over to petitioner would be a wholly advisory opinion, because the *res* is no longer subject to the control of the court. Under Article III, "a federal court has neither the power to render advisory opinions nor 'to decide ques-

tions that cannot affect the rights of litigants in the case before them.'" *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). Just as a federal court cannot proceed with a case once the case has become moot, so too a federal court in an *in rem* action cannot proceed to consider the rights of litigants to a *res* that is no longer before the court. And because control of the *res* is crucial to the existence of an ongoing case or controversy in an *in rem* action, that control must be maintained at all stages of the action. See *Deakins* v. *Monaghan*, 484 U.S. at 199; *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974) ("The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."); *United States* v. *Certain Real & Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991) (civil forfeiture proceeding is moot when court no longer has "the ability to grant the claimant her requested remedy, the return of her * * * interest in the property"); *Teyseer Cement Co.* v. *Halla Maritime Corp.*, 794 F.2d 472, 475 (9th Cir. 1986) (removal of *res* moots *in rem* action, because court "cannot take jurisdiction over a claim as to which no effective relief can be granted").[12]

The traditional *in rem* rule also implicates Article III concerns of the kind that underlie principles of standing. To establish a case or controversy under

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[12] Contrary to petitioner's contention (Pet. Br. 7 n.1), the requirement that a court have control of the *res* in an *in rem* action is not analogous to the amount in controversy requirement in diversity actions. Because a judgment *in rem* must be satisfied out of the *res*, continued control of the *res* is necessary to ensure that the judgment will be satisfied.

Article III, a plaintiff must show an injury to himself that "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement." *Allen* v. *Wright*, 468 U.S. 737, 766 (1984) (quoting *Simon*, 426 U.S. at 39). See also *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). "[I]t [is] not enough that a dispute was very much alive when suit was filed * * *. The parties must continue to have a ' "personal stake in the outcome" ' of the lawsuit." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990), quoting *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983), quoting, in turn, *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). See also *Lujan* v. *Defenders of Wildlife*, No. 90-1424 (June 12, 1992), slip op. 4.

In *Gollust* v. *Mendell*, 111 S. Ct. 2173, 2180 (1991), the Court concluded that allowing a plaintiff to maintain an action "after he had lost any financial interest in its outcome" would raise "serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III's case or controversy limitation on federal court jurisdiction." 111 S. Ct. at 2180. Similar concerns are raised by allowing a claimant in an *in rem* action to continue to litigate a claim to a *res* that is no longer within the court's control. The court is not in a position to direct that the *res* be used to satisfy a judgment for petitioner; consequently, petitioner does not "stand to profit" from a decision in its favor.

It is no answer to contend that the court may simply enter a judgment against the United States for the value of the *res*, and thereby afford the claimant relief. That would obliterate the distinction between *in rem* and *in personam* jurisdiction (see pp. 35-36, *infra*), would violate principles of sovereign immunity establishing that the United States does not consent to suit *in personam* by bringing a proceeding *in rem* (see pp. 36-38, *infra*), and—as we now discuss—would contravene the Appropriations Clause.[13]

b. Departure from established *in rem* principles would raise concerns under the Appropriations Clause. More than a month after the district court entered final judgment against petitioner, the United States Marshal transferred the proceeds of the sale of the residence on Miraflores Avenue to the Assets Forfeiture Fund in the United States Treasury. See J.A. 25-28 & n.1. As noted, the district court no longer controls any *res* that it could order released to petitioner if petitioner were to prevail in this *in rem* action on appeal. Any order in petitioner's favor would therefore require the government to disburse funds from the Treasury. Because Congress has not provided that funds may be paid out of the Treasury

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[13] These concerns would be mitigated if there were a substantial likelihood that a judgment could be satisfied even though the court has lost control of the *res*. In *Continental Grain*, for example, there was no doubt that the plaintiff could recover on an essentially identical *in personam* claim. And in *The Rio Grande*, the plaintiff was able to execute on the judgment by re-arresting the *res*. That is not possible in this case, because the *res* has been deposited in the Treasury and Congress has not appropriated money to pay a judgment for petitioner. See pp. 30-34, *infra*.

in these circumstances, any payment to petitioner is forbidden by the Appropriations Clause.

The Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7, provides in unambiguous terms that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2471 (1990), this Court recognized that "the Clause provides an explicit rule of decision: the payment of money from the Treasury must be authorized by statute." The Court explained that the Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good." *Id.* at 2473. See also *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851); *Rochester Pure Waters Dist.* v. *EPA*, 960 F.2d 180 (D.C. Cir. 1992); 2 J. Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858) ("As all the taxes raised from the people, *as well as the revenues arising from other sources*, are to be applied to the discharge of the expenses and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide how and when any money should be applied for these purposes.") (emphasis added).

In *Knote* v. *United States*, 95 U.S. 149 (1877), the Court held that the President had no power to order the Treasury to refund from the Treasury the proceeds from the sale of property forfeited by a person convicted of treason. The Court reasoned, in language applicable to this case, that "if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress." *Id.* at 154.

Thus, when funds obtained by forfeiture are deposited into the Treasury, payment from those funds is barred by the Appropriations Clause absent congressional authorization to make the payment at issue. As this Court recognized more recently in *United States* v. *Nordic Village, Inc.*, 112 S. Ct. at 1017, "[a] suit for payment of funds from the Treasury is quite different from a suit for the return of tangible property in which the debtor retained ownership."[14]

"Where Congress has addressed the subject * * * and authorized expenditures when a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized." *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion). See also *OPM* v. *Richmond*, 110 S. Ct. at 2475 ("funds may be paid out only on the basis

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[14] In *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991), the court of appeals exhibited some confusion caused by the fact that when money is seized under 21 U.S.C. 881, it is frequently held in a special Department of Justice account, known as the Seized Asset Deposit Fund, pending a final order of the district court. The purpose of the Seized Asset Deposit Fund, which was established pursuant to the Attorney General's authority under 21 U.S.C. 881(c)(2), is to safeguard money that is subject to a forfeiture proceeding while the proceeding is pending. Money in the Seized Asset Deposit Fund is not public money. Separate sub-accounts are maintained by the United States Marshals in each judicial district. The marshals maintain control over the assets in their sub-accounts, and can withdraw money from their sub-accounts pursuant to court order. In contrast, funds that have been deposited in the Assets Forfeiture Fund are public monies that are not subject to the control of the courts. See 28 U.S.C. 524(c). Petitioner's argument that the court in this *in rem* action could order payment from the Treasury ignores this key distinction.

of a judgment based on a substantive right to compensation based on the express terms of a specific statute"). Under 21 U.S.C. 881(e)(2)(A), the proceeds from any sale of forfeited property can be used only for two specified purposes: payment of the expenses of the seizure and sale and payments to informants. The Attorney General is required to "forward to the Treasurer of the United States, for deposit in accordance with section 524(c) of Title 28, any amounts * * * remaining after payment of the expenses provided in subparagraph (A)." 21 U.S.C. 881(e)(2)(B).

Section 524(c) of Title 28, in turn, authorizes expenditures from the Assets Forfeiture Fund only for specified purposes. Section 524(c) provides, in part:

> There is established *in the United States Treasury* a special fund to be known as the Department of Justice Assets Forfeiture Fund * * * which shall be available to the Attorney General without fiscal year limitation for the following purposes of the Department of Justice—
>
> * * * * *
>
> (D) the compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by the Department of Justice, subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made.
>
> (E) disbursements authorized in connection with remission or mitigation procedures relating to property forfeited under any law enforced or administered by the Department of Justice.

28 U.S.C. 524(c)(1)(D) and (E) (emphasis added).[15]

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[15] Procedures for administrative remission and mitigation of civil forfeitures are set out at 28 C.F.R. Pt. 9.

There is no question that the Appropriations Clause applies to monies in the Assets Forfeiture Fund. Congress expressly established the Fund "in the United States Treasury," and provided that amounts for paying certain expenses "shall be specified in appropriations acts." 28 U.S.C. 524(c). In addition, it is clear that Section 524(c) does not authorize payment of a judgment for petitioner in the circumstances of this case. Instead, Congress has authorized such payments only pursuant to administrative determinations made by the Attorney General. In the absence of an express authorization from Congress to pay petitioner from the Treasury, the Appropriations Clause bars petitioners' appeal. See *United States* v. *$57,480.05 United States Currency*, 722 F.2d 1457, 1459 (9th Cir.), cert. denied, 469 U.S. 916 (1984).[16]

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[16] Petitioner cannot avail itself of 31 U.S.C. 1304, the general appropriation for payment of judgments against the United States. Section 1304 "does not create an all-purpose fund for judicial disbursement. * * * Rather, funds may be paid out only on the basis of a judgment *based on a substantive right to compensation based on the express terms of a specific statute.*" *OPM* v. *Richmond*, 110 S. Ct. at 2475 (emphasis added). See *Trout* v. *Garrett*, 891 F.2d 332, 335 (D.C. Cir. 1989) ("The judgment fund legislation * * * authorizes no claims for relief. It is auxiliary legislation; its sole office is to furnish 'a mechanism for facilitating payment of judgments' rendered on claims authorized by *another* statute.") (quoting *Rosenfeld* v. *United States*, 859 F.2d 717, 727 (9th Cir. 1988)). Here, no statute gives petitioner a substantive right to compensation. On the contrary, the specific and detailed appropriations provisions of 28 U.S.C. 524(c) indicate that Congress "has considered and rejected the possibility of an additional exercise of its appropriation power" in this context. *OPM* v. *Richmond*, 110 S. Ct. at 2474. See *United States* v. *MacCollom*, 426 U.S. at 321.

B. *The United States Does Not Submit to the* In Personam *Jurisdiction of the Court By Bringing An* In Rem *Forfeiture Proceeding.*

Petitioner contends (Pet. Br. 10-14) that the United States, by bringing an *in rem* action against the Miraflores Avenue property, has consented to the *in personam* jurisdiction of the district court. Accordingly, petitioner argues, the court retains *in personam* jurisdiction over the United States even though it no longer has control over the *res*. That argument is unpersuasive.

It is well settled that the existence of *in rem* and *in personam* jurisdiction turns not on whether the parties have invoked the judicial process, but on the substantive nature of their claims. In admiralty, *in rem* jurisdiction exists only if the claim at issue gives rise to a maritime lien. See G. Gilmore & C. Black, *supra*, § 1-12, at 35-36; *id.* § 9-19, at 622. To be sure, substantive admiralty law provides that "many transactions and occurrences give rise to both a personal liability and a maritime lien." *Id.* at 36. When a case involves overlapping *in rem* and *in personam* claims, there is some basis for allowing the court to retain jurisdiction even after the *res* is removed from the district. See *Inland Credit Corp.* v. *M/T Bow Egret*, 552 F.2d 1148 (5th Cir. 1977). Cf. *Continental Grain Co.* v. *Barge FBL-585*, *supra*. But that basis for retaining jurisdiction is not present in this case, which involves only an *in rem* claim for civil forfeiture. See *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571, 1575-1577 ((11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988); *Martin* v. *The Bud*, 172 F.2d 295, 297 (9th Cir. 1949).[17]

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[17] Contrary to petitioner's contention (Pet. Br. 10), *Adam* v. *Saenger*, 303 U.S. 59 (1938), does not stand for the proposi-

If the decision to litigate an *in rem* claim automatically conferred *in personam* jurisdiction on the court, the fundamental distinction between actions *in rem* and actions *in personam* would be obliterated. The court could enter judgment against the participants themselves, rather than the *res*, and the amount of the judgment would not be limited to the value of the *res*. Moreover, the Supplemental Rules For Certain Admiralty and Maritime Claims expressly allow a claimant in an *in rem* action to contest the action without "appear[ing] for the purposes of any other claim with respect to which such process is not available or has not been served." Rule E(8).[18]

Even if it were generally true that the plaintiff in an *in rem* proceeding submits to the *in personam* jurisdiction of the court, that rule would not apply

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tion that the plaintiff in an *in rem* action is subject to the *in personam* jurisdiction of the court. That case held only that "[t]here is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts." *Id.* at 67.

[18] Petitioner suggests (Pet. Br. 12-14) that recent decisions of this Court have eroded the distinction between *in rem* and *in personam* jurisdiction. In *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), the Court held that the "minimum contacts" analysis of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), applies to all assertions of state court jurisdiction, including *in rem* jurisdiction. And in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court held that notice by publication is constitutionally inadequate if it is "not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319. *Shaffer* and *Mullane* merely extended the requirements of the Due Process Clause to actions *in rem*; they did not, as petitioner suggests, dissolve the distinction between actions *in rem* and actions *in personam*. Petitioner raises no Due Process claim in this case.

to forfeiture proceedings brought by the United States. "[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). Waivers of sovereign immunity are strictly construed in favor of the United States. *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991); *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986). In particular, "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453, 457 (1990), quoting *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), quoting, in turn, *United States* v. *King*, 395 U.S. 1, 4 (1969). No provision of 21 U.S.C. 881 waives the government's immunity from suit. Nor does any other statute provide that the United States submits to a court's *in personam* jurisdiction by filing an *in rem* forfeiture proceeding.

This Court recently rejected the contention that the "court's *in rem* jurisdiction overrides sovereign immunity." *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1017 (1992). The Court observed that it has "never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery," and expressly concluded that "[a] suit for payment of funds from the Treasury is quite different from a suit for the return of tangible property in which the debtor retained ownership." *Ibid.* The Court noted that decisions applying ordinary principles of the law of trusts are irrelevant when the party at issue is the United States. In addition, the Court observed that *Bull* v. *United States*, 295 U.S. 247 (1935)—a case that did involve the government—

"concern[ed] equitable recoupment, a doctrine that has been substantially narrowed by later cases" and has no application in the context of *in rem* proceedings. 112 S. Ct. at 1017 (citing *United States* v. *Dalm*, 494 U.S. 596, 608 (1990)). See also *United States* v. *Shaw*, 309 U.S. 495 (1940) (United States did not waive its sovereign immunity to a cross-claim by the estate by filing a claim against a decedent's estate in *in rem* proceeding in state court).

C. *Neither the Federal Rules of Appellate Procedure Nor the Venue Provisions of 21 U.S.C. 881 Confer Jurisdiction on the Court of Appeals.*

1. There is no force to petitioner's contention (Pet. Br. 6) that the court of appeals' dismissal for want of jurisdiction was contrary to Federal Rule of Appellate Procedure 3(a). The Federal Rules of Appellate Procedure themselves specify that the Rules "shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law." Fed. R. App. P. 1(b). Rule 3(a) provides, in relevant part, that "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal." Although Rule 3(a) provides that the filing of a timely notice of appeal is a jurisdictional prerequisite to review by the court of appeals, see *United States* v. *Robinson*, 361 U.S. 220, 224 (1960), that is not the only jurisdictional prerequisite. If the district court lacked jurisdiction, the court of appeals has "jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Bender* v. *Williamsport Area School District*, 475 U.S. at 541 (quoting *United States* v. *Corrick*, 298 U.S. 435, 440 (1936)). Similarly, if the district court no longer has *in rem*

jurisdiction because it has released the *res* from its control, it follows that the court of appeals cannot exercise *in rem* jurisdiction.[19]

2. Petitioner also contends (Pet. Br. 16-19) that 21 U.S.C. 881(j) confers jurisdiction on the court of appeals. Section 881(j) is entitled "Venue," and provides:

> In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

By its plain terms, Section 881(j) allows a forfeiture proceeding to be "brought" outside the district where the property is located only "in the case of property of a defendant charged with a violation that is the basis for forfeiture." At the time the government brought this forfeiture proceeding, no criminal prosecution was pending against Indalecio Iglesias, the owner of the property. Consequently, Section 881(j) simply does not apply in this case. Even in cases in which Section 881(j) applies, moreover, the government may elect to proceed under 28 U.S.C. 1395, which provides that a civil forfeiture proceeding may be prosecuted in any district where the property is found or into which the property is brought. If the

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[19] That is particularly so where, as here, a judgment on the merits in petitioner's favor would require payment of money from the Treasury in violation of the Appropriations Clause. See pp. 30-34, *supra*.

government chooses to proceed under 28 U.S.C. 1395, the property owner is not entitled to insist that the government make a different choice.

In any event, Section 881(j) bears only on venue; it does not concern the court's jurisdiction. As this Court has explained, jurisdiction goes to the court's power to hear an action, while venue relates only to the locality of a suit among courts with jurisdiction to hear it. See *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-168 (1939); see also 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3801, at 4-6 (2d ed. 1986) ("distinction between the court's power to adjudicate and the place where that authority may be exercised must always be recognized"). A statute such as Section 881(j) that defines the venue for an action cannot expand the jurisdiction of a court to hear an action.[20]

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[20] The legislative history of Section 881(j) indicates that the provision was intended to eliminate the need to conduct separate civil forfeiture proceedings in cases in which the property of a criminal defendant is located in several districts. See S. Rep. No. 225, 98th Cong., 2d Sess. 210 (1984) ("In cases of large drug trafficking operations, forfeitable property may be located in several districts. Thus, separate but parallel civil actions must be filed in each district in which property is located."). If the government chooses to avail itself of the venue provisions of 21 U.S.C. 881(j), the property must be seized pursuant to an arrest warrant issued by the court in the district in which the property is located. See 21 U.S.C. 881(b). Under 21 U.S.C. 881(c), the property is deemed to be in the custody of the Attorney General, subject to the orders of the court, during the pendency of the action. The district court in which the owner is found or prosecuted thus has *in rem* jurisdiction, because (1) the property was seized pursuant to the Supplemental Rules For Certain Admiralty and Maritime Claims, and (2) the property remains subject to the control of the court. Once a final judgment of forfeiture is executed, however, the court no longer has control of the property and therefore no longer has *in rem* jurisdiction.

D. *Requiring a Losing Claimant in a Forfeiture Action to Take Reasonable Steps to Preserve the Court's Jurisdiction on Appeal Is Not Unfair.*

Petitioner contends (Pet. Br. 19-22) that requiring a losing claimant in a civil forfeiture action to take steps to preserve the court's jurisdiction on appeal is unduly burdensome and unfair. Petitioner's policy arguments cannot affect the scope of the jurisdiction of the federal courts. In any event, petitioner's assertions of unfairness are greatly overstated.

After a district court enters a final judgment of forfeiture, the government is not permitted to remove the *res* from the court's jurisdiction until the losing claimant has had an opportunity to preserve the court's jurisdiction on appeal. Under Fed. R. Civ. P. 62(a), proceedings to enforce the judgment are automatically stayed for 10 days. Losing claimants are thus afforded an opportunity to review the district court's decision and take action to preserve the court's jurisdiction on appeal.

Petitioner asserts (Pet. Br. 20-21) that it is unfair "to require a losing litigant objectively to decide whether an appeal is warranted in such a short time." Pet. Br. 21. But Rule 62(a) affords the same 10-day automatic stay to most losing parties. Indeed, some losing parties—notably, in actions in which an injunction is entered—are not entitled to any automatic stay. See Fed. R. Civ. P. 62(a). It is often the case that a losing party may suffer irreversible consequences if it fails to obtain a stay before the judgment is executed. The government, for example, routinely confronts that situation when it loses a case in district court under the Freedom of Information Act, 5 U.S.C. 552. See, *e.g.*, *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979). In crimi-

nal cases, moreover—where the stakes may be much higher than in a civil proceeding—a defendant is allowed only 10 days in which to file a notice of appeal. Fed. R. App. P. 4(b). Consequently, there is no merit to petitioner's contention that it is unfair to require losing claimants in forfeiture proceedings to decide whether to appeal within 10 days.

In addition to the automatic 10-day stay, a losing claimant can obtain an automatic stay pending appeal by posting a supersedeas bond. See Fed. R. Civ. P. 62(d). Petitioner does not contend that it was unable to post a bond in this case, or that it is unduly burdensome to require claimants to post a bond if they can afford to do so. Instead, petitioner argues (Pet. Br. 19-20) that requiring losing claimants to post a bond "effectively limits the right to appeal forfeiture judgments to wealthy claimants." Pet. Br. 19. But a district court has discretion to enter a stay pending appeal without requiring the appellant to satisfy the supersedeas bond requirement of Fed. R. Civ. P. 62(d). See *Northern Indiana Public Serv. Co.* v. *Carbon County Coal Co.*, 799 F.2d 265, (7th Cir. 1986); *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.* 786 F.2d 794, 796 (7th Cir. 1986); *Federal Prescription Serv., Inc.* v. *American Pharmaceutical Ass'n*, 636 F.2d 755, 757-760 (D.C. Cir. 1980); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 62.06 (2d ed. 1992). Indeed, the courts have so held in the context of civil forfeiture proceedings. *United States* v. *Certain Real and Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991) ("bond requirement may be waived in a court's discretion"); *United States* v. *Tit's Cocktail Lounge*, 873 F.2d at 143 ("Upon motion to the district court, [the] bond requirement

may be waived in the court's discretion.").[21] If the district court refuses to stay its judgment pending appeal, a claimant may seek a stay from the court of appeals, see Fed. R. App. P. 8(a); Fed. R. Civ. P. 62(g), and from this Court, Sup. Ct. R. 23.4 ("The judge, court, or Justice granting an application for a stay pending review by this Court *may* condition the stay on the filing of a supersedeas bond."). Petitioner's assertion (Pet. Br. 19 n.3) that "there are apparently no courts which will dispense with a bond where posting a bond would render the party insolvent" is incorrect. Indeed, the very case that petitioner cites for that proposition, *Miami Int'l Realty Co.* v. *Paynter*, 807 F.2d 871, 874 (10th Cir. 1986), affirmed the district court's decision not to require the defendant to post a full bond because "he was financially unable to post a full bond and * * * execution on the judgment would place him in insolvency." See also *Federal Prescription Serv.*, 636 F.2d at 758 (citing authorities).

Finally, there is no basis for petitioner's assertion (Pet. Br. 21-22) that requiring losing claimants who

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[21] Petitioner asserts (Pet. Br. 19 n.3) that there are "contrary cases" collected in a footnote to the District of Columbia Circuit's *Federal Prescription Service* opinion. But one of the decisions of a court of appeals cited in that footnote held only that the district court erred in staying the execution of a money judgment for more than a year without attempting to justify its action. See *Geddes* v. *United Financial Group*, 559 F.2d 557, 560-561 (9th Cir. 1977). A second cited decision held that the district court did not err in holding a husband in contempt for failing to make court-ordered support payments after he failed to obtain a stay of the court's judgment pending appeal. *Gullet* v. *Gullet*, 174 F.2d 531, 533 (D.C. Cir. 1949). The third cited decision contains only a general statement that "bond securing payment of money judgment must be given, if * * * stay pending appeal is desired." *Fidelity & Deposit Co.* v. *Davis*, 127 F.2d 780, 782 (4th Cir. 1942).

wish to appeal a judgment of civil forfeiture to post a bond or seek a stay will lead to an "avalanche" of emergency stay motions that will increase "exponentially" the burden on the federal courts. Some losing claimants will decide not to appeal, and others will be able to obtain an automatic stay by posting a supersedeas bond. In many cases, the question presented here will not even arise, because the *res* will not be mobile in the first place. See *United States* v. *Tit's Cocktail Lounge*, 873 F.2d at 144 (appeal may proceed without stay as to real property that has not been sold). There is no indication that stay applications filed by the remaining claimants will create a significant burden for the courts. The Fifth, Seventh, Ninth, and Eleventh Circuits have held that removal of the *res* terminates the court's jurisdiction in an *in rem* forfeiture proceeding. See note 3, *supra*. Yet we are aware of no evidence, and petitioner cites none, that a flood of emergency stay motions has resulted in those circuits.

In sum, requiring losing claimants in an *in rem* forfeiture proceeding to take action to preserve the court's jurisdiction on appeal is neither unfair nor unduly burdensome. Because petitioner failed to take any steps to preserve the court's jurisdiction, its complaints about the dismissal of its appeal are not justified.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1992

APPENDIX

U.S. Const., Article I

* * * * *

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; * * *

* * * * *

Article III.

* * * * *

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—[between a State and Citizens of another State;—]* between the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.]*

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be

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* Changed by the Eleventh Amendment.

held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * * * *

21 U.S.C. 881

§ 881. Forfeitures

Subject property

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consent-

ing party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 857 of this title).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

* * * * *

(b) Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

Custody of Attorney General

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provision of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

Other laws and proceedings applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent

that such duties arise from seizures and forfeitures effected by any customs officer.

Disposition of forfeited property

(e)(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of Title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291(h) of Title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A) except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of Title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of

the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

Forfeiture and destruction of schedule I and II substances

(f) (1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a) (2) of this section; and any equipment or container subject to forfeiture under subsection (a) (2) or (3) of this section which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a) (2) of this section; and any equipment or container subject to forfeiture under subsection (a) (2) or (3) of this section which cannot be separated safely from such

raw materials or products under such circumstances as the Attorney General may deem necessary.

Plants

(g) (1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

Vesting of title in United States

(h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

Stay of civil forfeiture proceedings

(i) The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II of this chapter, which is also related

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to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

Venue

(j) In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

Agreement between Attorney General and Postal Service for performance of functions

(*l*)[1] The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

28 U.S.C. 524(c)

§ 524. Availability of appropriations

* * * * *

(c)(1) There is established in the United States Treasury a special fund to be known as the Department of Justice Assets Forfeiture Fund (hereafter in this subsection referred to as the "Fund") which shall be available to the Attorney General without fiscal year limitation for the following purposes of the Department of Justice—

(A) the payment, at the discretion of the Attorney General, of any expenses necessary to

[1] So in original. No subsec. (k) has been enacted.

seize, detain, inventory, safeguard, maintain, advertise, or sell property under seizure, detention, or forfeited pursuant to any law enforced or administered by the Department of Justice, or of any other necessary expenses incident to the seizure, detention, or forfeiture of such property; such payments may include—

(i) payments for contract services, the employment of outside contractors to operate and manage properties or provide other specialized services as necessary to dispose of such properties in an effort to maximize the return from such properties, and payments to reimburse any Federal, State, or local agency for any expenditures made to perform the foregoing functions; and

(ii) payments made pursuant to regulations promulgated by the Attorney General, that are necessary and direct program-related expenses for the purchase or lease of automatic data processing equipment (not less than a majority of which use will be program related), training, printing, contracting for services directly related to the identification of forfeitable assets [2] processing of and accounting for forfeitures, and the storage, protection, and destruction of controlled substances;

(B) the payment of awards for information or assistance directly relating to violations of the criminal drug laws of the United States;

(C) the payment of awards for information or assistance leading to a civil or criminal for-

[2] So in original. Probably should be followed by a comma.

feiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 800 et seq.) or a criminal forfeiture under the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. 1961 et seq.), at the discretion of the Attorney General;

(D) the compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by the Department of Justice, subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made, and the employment of attorneys and other personnel skilled in State real estate law as necessary;

(E) disbursements authorized in connection with remission or mitigation procedures relating to property forfeited under any law enforced or administered by the Department of Justice;

(F) for equipping for drug law enforcement functions any government-owned or leased vessels, vehicles, and aircraft available for official use by the Drug Enforcement Administration, the Federal Bureau of Investigation, the Immigration and Naturalization Service, or the United States Marshals Service;

(G) for purchase of evidence of any violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, chapter 96 of title 18, or sections 1956 and 1957 of title 18; and

(H) after all reimbursements and program-related expenses have been met at the end of fiscal year 1989, the Attorney General may trans-

fer deposits from the Fund to the building and facilities account of the Federal prison system for the construction of correctional institutions.

Amounts for paying the expenses authorized by subparagraphs (A)(ii), (B), (C), (F), and (G) shall be specified in appropriations acts. Amounts for other authorized expenditures and payments from the Fund, including equitable sharing payments, are not required to be specified in appropriations acts. The Attorney General may exempt the procurement of contract services under subparagraph (A) under the fund from section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 and following), and other provisions of law as may be necessary to maintain the security and confidentiality of related criminal investigations.

(2) Any award paid from the Fund for information, as provided in paragraph (1)(B) or (C), shall be paid at the discretion of the Attorney General or his delegate, under existing departmental delegation policies for the payment of awards, except that the authority to pay an award of $250,000 or more shall not be delegated to any person other than the Deputy Attorney General, the Associate Attorney General, the Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration. Any award for information pursuant to paragraph (1)(B) shall not exceed $250,000. Any award for information pursuant to paragraph (1)(C) shall not exceed the lesser of $250,000 or one-fourth of the amount realized by the United States from the property forfeited.

(3) Any amount under subparagraph (F) of paragraph (1) shall be paid at the discretion of the At-

torney General or his delegate, except that the authority to pay $100,000 or more may be delegated only to the respective head of the agency involved.

(4) There shall be deposited in the Fund all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice, except all proceeds of forfeitures available for use by the Secretary of the Treasury or the Secretary of the Interior pursuant to section 11(d) of the Endangered Species Act (16 U.S.C. 1540(d)) or section 6(d) of the Lacey Act Amendments of 1981 (16 U.S.C. 3375(d)) or the Postmaster General of the United States pursuant to section 2003(b)(7) of title 39.

(5) Amounts in the Fund which are not currently needed for the purpose of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States and all earnings on such investments shall be deposited in the Fund.

(6) The Attorney General shall transmit to the Congress, not later than 4 months after the end of each fiscal year, two detailed reports as follows:

(A) a report on—

(i) the estimated total value of property forfeited under any law enforced or administered by the Department of Justice with respect to which funds were not deposited in the Fund; and

(ii) the estimated total value of all such property transferred to any State or local law enforcement agency; and

(B) a report on—

(i) the Fund's beginning balance;

(ii) sources of receipts (seized cash, conveyances, and others);

(iii) liens and mortgages paid and amount of money shared with State and local law enforcement agencies;

(iv) the net amount realized from the year's operations, amount of seized cash being held as evidence, and the amount of money legally allowed to be carried over to next year;

(v) any defendant's equity in property valued at $1,000,000 or more; and

(vi) Year-end Fund balance.

(7) The Fund shall be subject to annual audit by the Comptroller General.

(8) The provisions of this subsection relating to deposits in the Fund shall apply to all property in the custody of the Department of Justice on or after the effective date of the Comprehensive Forfeiture Act of 1983.

(9) There are authorized to be appropriated such sums as necessary for the purposes described in subparagraphs (A)(ii), (B), (C), (F), and (G) of paragraph (1). At the end of each of fiscal years 1990, 1991, and 1992, unobligated amounts not to exceed $150,000,000 remaining in the Fund shall be deposited in the Special Forfeiture Fund, except that an amount not to exceed $15,000,000 or, if determined necessary by the Attorney General to meet asset specific expenses, an amount equal to one-twelfth of the previous year's expenditures may be carried forward and remain available for appropriation in the next fiscal year.

(10) For the purposes of this subsection, property is forfeited pursuant to a law enforced or adminis-

tered by the Department of Justice if it is forfeited pursuant to—

(A) any criminal forfeiture proceeding;

(B) any civil judicial forfeiture proceeding; or

(C) any civil administrative forfeiture proceeding conducted by the Department of Justice,

except to the extent that the seizure was effected by a Customs officer or that custody was maintained by the United States Customs Service in which case the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. 1613a)[3] shall apply.

Supplemental Rules for Certain Admiralty and Maritime Claims

Rule C. Actions in Rem: Special Provisions

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceeed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) Complaint. In actions, in rem the complaint shall be verified on oath or solemn affirmation. It

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[3] See References in Text note below.

shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Judicial Authorization and Process. [Effective until Dec. 1, 1991. See, also, subd. (3) below.] Except in actions by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the com-

plaint, shall forthwith issue a summons and warrant for the arrest of the vesel or other property without requiring a certification of exigent circumstances.

(3) Judicial Authorization and Process. [Effective on Dec. 1, 1991. See, also, subd. (3) above.] Except in actions by the United States for forfeitures or federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant. If the property is a vessel or a vessel and tangible property on board the vessel, the warrant shall be delivered to the marshal for service. If other property, tangible or intangible is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to enforce it, who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a sumons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-

arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) Ancillary Process. [Effective until Dec. 1, 1991. See, also, subd. (5) below.] In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(5) Ancillary Process. [Effective on Dec. 1, 1991. See, also, subd. (5) above.] In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession of control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

Rule E. Actions in Rem and Quasi in Rem: General Provisions

(1) Applicability. Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) Complaint; Security.

(a) *Complaint.* In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(b) *Security for Costs.* Subject to the provisions of Rule 54(d) and of relevant statutes, the court may, on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against the party by an interlocutory order or by the final judgment, or on appeal by any appellate court.

(3) Process.

(a) *Territorial Limits of Effective Service.* Process in rem and of maritime attachment and garnishment shall be served only within the district.

(b) *Issuance and Delivery.* Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

(4) Execution of Process; Marshal's Return; Custody of Property; Procedures for Release. [Effective until Dec. 1, 1991. See, also, subd. (4) below.]

(a) In General. Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal shall forthwith execute the process in accordance with this subdicision (4), making due and prompt return.

(b) Tangible Property. If tangible property is to be attached or arrested, the marshal shall take it into the marshal's possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or a deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

(c) Intangible Property. If intangible property is to be attached or arrested the marshal shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event

the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) Directions with Respect to Property in Custody. The marshal may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(e) Expenses of Seizing and Keeping Property; Deposit. These rules do not alter the provisions of Title 28, U.S.C., § 1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

(f) Procedure for Release from Arrest or Attachment. Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

(4) Execution of Process; Marshal's Return; Custody of Property; Procedures for Release [Effective on Dec. 1, 1991. See, also, subd. (4) above.]

(a) In General. Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal or other person

or organization having a warrant shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) Tangible Property. If tangible property is to be attached or arrested, the marshal or other person or organization having the warrant shall take it into the marshal's possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal or other person executing the process shall affix a copy thereof to the property in a conspicuous place and leave a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshall or deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

(c) Intangible Property. If intangible property is to be attached or arrested the marshal or other person or organization having the warrant shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) Directions With Respect to Property in Custody. The marshal or other person or organization having the warrant may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(5) Release of Property.

(a) Special Bond. Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(b) General Bond. The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel

shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(c) Release by Consent or Stipulation; Order of Court or Clerk; Costs. [*Effective until Dec. 1, 1991. See, also, subd. (5)(c) below.*] Any vessel, cargo, or other property in the custody of the marshal may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal shall not deliver any property so released un-

til the costs and charges of the officers of the court shall first have been paid.

(c) Release by Consent or Stipulation; Order of Court or Clerk; Costs. [*Effective Dec. 1, 1991. See, also, subd. (5)(c) above.*] Any vessel, cargo, or other property in the custody of the marshal or other person or organization having the warrant may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal, other person or organization having the warrant, or other officer of the court shall be relased without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal or other person or organization having the warrant shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

(d) Possessory, Petitory, and Partition Actions. The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

(6) Reduction or Impairment of Security. Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become

insufficient, new or additional sureties may be required on motion and hearing.

(7) Security on Counterclaim. Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaims, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

(8) Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) Disposition of Property; Sales.

(a) Actions for Forfeitures. In any action in rem to enforce a forfeiture for violation of a statute of the

United States the property shall be disposed of as provided by statute.

(b) Interlocutory Sales. [*Effective until Dec. 1, 1991. See also, subd. (9)(b) below.*] If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(b) Interlocutory Sales. [*Effective on Dec. 1, 1991. See, also, subd. (9)(b) above.*] If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(c) Sales, Proceeds. [*Effective until Dec. 1, 1991. See, also, subd. (9)(c) below.*] All sales of property shall be made by the marshal or a deputy marshal, or other proper officer assigned by the court where the marshal is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

(c) Sales, Proceeds. [*Effective on Dec. 1, 1991. See, also, subd. (9)(c) above.*] All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

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No. 91-767

In the Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC NATIONAL BANK OF MIAMI

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF BY PETITIONER

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ARGUMENT

In its initial Brief on the Merits, Petitioner Republic National Bank of Miami ("Republic" or "the Bank") showed that the Eleventh Circuit erred by holding that the Government's transfer of the money from one Government account to another during the appeal divested the court of appellate jurisdiction. Republic analyzed the admiralty law origins of the Government's proposed rule of appellate jurisdiction and explained why the Government's attempted analogy to admiralty law fictions should not prevail here. Republic showed that the basic principles of *in rem* jurisdiction — which were developed to broaden jurisdiction and expand the remedies of aggrieved parties — should not be used to narrow or extinguish appellate remedies in civil forfeiture currency cases. Republic also exposed the injustice of the Government's position — which would require claimants to forfeited property to obtain an emergency stay or post a supersedeas bond in order to appeal, even though the *res* is located in a Government-controlled account and thus in no danger of being dissipated pending appeal.

In its Brief on the Merits, the Government argues that absent a stay or a bond, the Government can terminate the jurisdiction of the appellate courts in civil forfeiture cases by transferring the *res* during the appeal, and that it would take an act of Congress to revive jurisdiction. The Government also argues the adverse "facts" found by the district court, undoubtedly intending to shift this Court's focus from the legal issue involved in this proceeding.

As discussed below, the cases cited by the Government support Republic's position, not the Government's, and the Constitutional provisions on which the Government rely do not apply to the issue presented. The Government also fails to address the central policy consideration raised in this case: What protection does a supersedeas bond or stay afford the Government during an appeal of a civil forfeiture judgment involving money where the Government at all times has custody of the funds? The answer is none — there is no sound reason to require claimants to post a

bond or obtain a stay as a condition precedent to appeal. The sole reason for the Government's proposed rule is its desire to prevent claimants from appealing. We respond below to the Government's arguments and explain why this Court should reject them.

I. THE GENERAL RULE: *IN REM* ADMIRALTY JURISDICTION VESTS ON INITIAL SEIZURE OF THE *RES* AND IS NOT DIVESTED BY THE SUBSEQUENT RELEASE OF THE PROPERTY.

Both parties agree that *in rem* admiralty jurisdiction attaches when the *res* is initially seized within the jurisdiction of the district court. Government's Brief at 13; Republic's Brief on the Merits at 6. The Government argues, however, that in a civil forfeiture case, the district court must also continue to have control of the *res* throughout the appeal, and if the Government transfers the property during the appeal, the appellate court cannot hear the case. The Government argues, by analogy, to admiralty law that "it has long been settled" that the release of the ship after initial seizure divests a court of admiralty jurisdiction, Government's Brief at 14, and cites *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815); *United States v. The Little Charles*, 26 F. Cas. 979 (C.C.D. Va. 1818); and *The Rio Grande*, 90 U.S. (23 Wall.) 458 (1874), in support of that assertion. The Government misreads these decisions.[1]

In *The Rio Grande*, this Court set forth the general rule that *in rem* admiralty jurisdiction is complete on initial seizure of the *res*:

> *We do not understand the law to be that an actual and continuous possession of the res is required to sustain the jurisdiction of the court. When the vessel was seized by the order of the court and brought within its control the jurisdiction was complete. . . .*

---

[1] The other cases cited on page 13 of the Government's Brief reiterate the general proposition that *in rem* jurisdiction depends on the court's seizure of the property, and do not address the consequences, if any, of the subsequent loss of possession of the property on the court's jurisdiction.

> We hold the rule to be that a valid seizure and actual control of the res by the marshal gives jurisdiction of the subject-matter, and that an accidental or fraudulent or improper removal of it from his custody, or delivery to the party upon security, does not destroy jurisdiction.

90 U.S. (23 Wall.) at 463-65 (emphasis added).

The Little Charles states essentially the same general rule that *in rem* admiralty jurisdiction is complete on initial seizure and is not divested by subsequent removal. There, Chief Justice Marshall, sitting as a Circuit Judge, rejected the contention "that the court has lost its jurisdiction, by losing possession of the thing to be condemned." 26 F. Cas. at 982. Rather, as Justice Marshall explained:

> That possession of the thing is necessary, as a foundation for the jurisdiction of the court, is, in general, true. There must be seizure to vest the jurisdiction. *But it is not believed that the continuance of possession, is necessary to continue the jurisdiction.* It is a general principle, that jurisdiction, once vested, is not divested, although a state of things should arrive in which original jurisdiction could not be exercised.

Id. (emphasis added).

In *The Little Charles,* Justice Marshall set forth, hypothetically, an exception to the general rule, namely, where the release of the property would render the judgment "useless" because "the thing could neither be delivered to the libellants, nor restored to the claimants," *id.,* there might be a loss of jurisdiction. Justice Marshall noted, however, that this exception "will not apply to any case where the judgment will have any effect whatever." *Id.*[2]

The only time this Court has recognized any exception to the general rule that continued control of the *res* is not required for *in*

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[2] The admiralty and prize statutes cited in the Government's Brief at 19 *et seq.* codify the general rule that *in rem* jurisdiction is vested on initial seizure. These statutes do not purport to divest an appellate court of jurisdiction where the Government removes the property.

rem admiralty jurisdiction was in *The Brig Ann,* 13 U.S. (9 Cranch) 289 (1815). There, the Court held that where the Government as the seizing party voluntarily abandoned the property to the defendant, the court could not proceed until a new seizure occurred. 13 U.S. at 291. Thus, for this exception to apply, the seizing party must voluntarily abandon the property.

The general rule of *in rem* jurisdiction discussed above is consistent with the purpose of *in rem* admiralty jurisdiction, which is to broaden the availability of remedies. Both the "voluntary abandonment" and "useless judgment" exceptions suggested in *The Brig Ann* and *The Little Charles* are based on the same practical necessity — that the court would have no power to enforce its decree. *The Brig Ann, supra,* 13 U.S. at 331; *The Little Charles, supra,* 26 F. Cas. at 982. Where the court may enforce its decree, neither exception applies.[3]

II. THE GOVERNMENT CAN BE ORDERED TO RESTORE THE PROPERTY AFTER A SUCCESSFUL APPEAL.

The general rule of continued jurisdiction after initial seizure and the two limited exceptions to the rule expose the fallacy of the Government's argument. The jurisdictional inquiry presented does not end by merely labelling the action "*in rem.*" Rather, the issue before this Court is whether the Government's transfer of the *res* to another Government bank account will render a subsequent judgment useless, or stated differently, whether the Government may be required to restore the property to the claimant if the judgment is reversed.

Here, although the Government transferred the funds after judgment was entered, a decision by the Eleventh Circuit on the merits will neither be ineffective nor useless. If the Eleventh Circuit affirms, the Government has an effective remedy, as it

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[3] Additionally, the "voluntary abandonment" exception recognized by this Court in *The Brig Ann* requires the seizing party — here the Government — to abandon the property. The Government has never abandoned the property in this case.

already has the funds. If the Eleventh Circuit reverses, Republic has an effective remedy, as the Government can be ordered to return the money to the Bank in payment of its mortgage under the ordinary rules of restitution applicable to all cases, *e.g., Atlantic Crash Line R. Co. v. State of Florida,* 295 U.S. 301, 309, (1935); *Bank of United States v. Bank of Washington,* 31 U.S. (6 Pet.) 8, 19 (1832), and under 28 U.S.C. §§ 2465 and 524 (c)(1)(D). *See infra at 10-12.*

A. THE COURT HAS JURISDICTION TO ORDER RETURN OF THE MONEY.

The Government argues that in an *in rem* action, after the Government takes the property, the court lacks jurisdiction to order the Government to return the property because the court supposedly lacks *in personam* jurisdiction over the Government. Government's brief at 35-36. The only forfeiture case cited by the Government is *United States v. One Lear Jet Aircraft,* 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied,* 487 U.S. 1204 (1988). As discussed in Republic's Brief on the Merits at 11-12, the Second, Fourth and Eighth Circuits have rejected the conclusion of *One Lear Jet. See United States v. Aiello,* 912 F. 2d 4, 7 (2d Cir. 1990), *cert. denied,* __U.S.__, 111 S. Ct. 757 (1991); *United States v. $95,945.18,* 913 F. 2d 1106, 1109 (4th Cir. 1990); *United States v. $12,390.00,* 956 F. 2d 801, 804 (8th Cir. 1992).

One Lear Jet is wrong in concluding that the appellate court lacks *in personam* jurisdiction over the Government in a forfeiture action brought by the Government. The majority in *One Lear Jet* incorrectly focused solely on the nature of the action *as against* the defendant property. We agree that as against the defendant property, or as against the claimant who makes a limited appearance, *see* Rule E(8), Supplemental Rules for Certain Admiralty and Maritime Claims, the court has *in rem* jurisdiction. That conclusion is irrelevant to the court's jurisdiction over the Government. There is a critical distinction between *in rem* jurisdiction over a defendant and jurisdiction over a plaintiff who initiates the action. In an *in rem* proceeding, the defendant can, if it wishes, limit its risk to losing its interest in the

seized property. Defendants are entitled to this protection because an *in rem* proceeding offers a plaintiff the opportunity to assert a claim against property where the owner/defendant may not be subject to the court's *in personam* jurisdiction. *See* Republic's Brief on the Merits at 10-14.

A plaintiff, however, is in a fundamentally different position. As in any *in personam* case, a plaintiff who commences an *in rem* action seeks to use the power of the court to obtain affirmative relief. The court's jurisdiction over a plaintiff is, accordingly, identical in either an *in personam* or an *in rem case*. As Judge Edmondson reasoned, in his dissent in *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1584 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988):

> The idea that, when a plaintiff comes into a court system requesting the courts' assistance in resolving a case, the plaintiff submits its person to the jurisdiction of those courts until the case is finally concluded seems to me to be neither innovative nor unfair. I agree with Judge Vance when he says that "we have had in personam jurisdiction over the United States from the instant the government invoked the jurisdiction of the federal courts to initiate the forfeiture proceeding."

This Court has recognized the distinction between jurisdiction over defendants and jurisdiction over plaintiffs in cases regarding counterclaims in admiralty/*in rem* libels. In *British Transport Comm'n v. United States*, 354 U.S. 129 (1957), this Court ruled that all claims against all parties who affirmatively seek damages which arise out of a collision between two vessels could be heard in an *in rem* libel. This Court stressed the obligation that comes from seeking affirmative relief in an *in rem* case:

> [F]airness in litigation requires that those who seek affirmative recovery in a court should be subject therein to like exposure for the damage resulting from their acts connected with the identical incident.

354 U.S. at 142.

This admiralty rule applies to the United States as a claimant seeking affirmative relief. *United States v. The Thekla,* 266 U.S. 328, 340-41 (1924) ("[The Government] joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to the act.") (brackets added). This Court has applied the same rule to the seizure of a ship as a prize. *See United States v. The Paquete Habana,* 189 U.S. 453, 465 (1903); *United States v. The Nuestra Senora de Regla,* 108 U.S. 92, 102 (1883). *See generally United States v. National City Bank of New York,* 83 F.2d 236, 238 (2d Cir.), *cert. denied,* 299 U.S. 563 (1936).

The forfeiture decisions of the Second, Fourth and Eighth Circuits and the dissenting opinions in *One Lear Jet* are consistent with this Court's decisions regarding counterclaims against the Government in admiralty/*in rem* cases. Here, the United States initiated this action, and by doing so, submitted itself to the court's jurisdiction until the case is finally adjudicated.

B. NEITHER THE APPROPRIATIONS CLAUSE NOR THE DOCTRINE OF SOVEREIGN IMMUNITY PRECLUDES THE RETURN OF THE PROPERTY.

The Government expresses "concerns" that under the Appropriations Clause, Article I, § 9, Cl. 7 to the U.S. Constitution, the courts may be powerless to prevent the Government from eliminating appellate jurisdiction in civil forfeiture cases. Government's Brief at 30. The Government also claims that the doctrine of sovereign immunity prevents the appellate court from hearing an appeal of an action brought by the Government. Government's Brief at 35-36. The Government is wrong.

1. Appropriations Clause.

The Appropriations Clause provides that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law." This provision requires that before money is paid from the Treasury, it "must be authorized by a statute." *Office of Personnel Management v. Richmond,* 496 U.S. 414, 423 (1990). The rationale for the clause is:

> to secure regularity, punctuality, and fidelity, in disbursements of public money .... If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its money resources at his pleasure. The power to control and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation....

2 J. Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858) (quoted in *Office of Professional Management, supra,* 496 U.S. at 427).

As an initial matter, the Government's reliance on the Appropriations Clause turns the separation of powers doctrine on its head. The Government attempts to use that doctrine — which limits each branch from encroaching on the other — to justify its attempt to encroach on the power of the judiciary to hear appeals. None of the cases cited by the Government justifies its misuse of the Appropriations Clause.

The Appropriations Clause cases cited by the Government limit the Executive Branch from using its Article II power to raid the Treasury. For instance, in *Knote v. United States,* 95 U.S. 149 (1877), this Court held that the Presidential pardon power, Article II, § 2, could not be used to require repayment of funds in the Treasury previously forfeited by the pardoned offender, absent congressional authorization. Similarly, in *Office of Personnel Management v. Richmond,* 496 U.S. 414, 428 (1990), this Court refused to allow unauthorized acts of agents of the Executive Branch to obligate the Treasury for the payment of funds. *See Reeside v. Walker,* 52 U.S. (11 How.) 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would *give to the fiscal officers a most dangerous discretion.*") (emphasis added).

This case is different. Here, the Executive Branch brought a lawsuit which it won in the trial court, transferred the forfeited

funds during the appeal and now argues that only an Act of Congress can give Republic relief. This Court has recognized that the separation of powers doctrine limits each branch; it is not a tool of aggrandizing one branch of the Government to the detriment of another:

> Although *Knote v. United States*, 95 U.S. 149, 154, 24 L.Ed. 442 (1877), held that the President's pardon power did not extend to the appropriation of moneys in the treasury without authorization by law for the benefit of pardoned criminals, it did not hold that Congress could impair the President's pardon power by denying him appropriations for pen and paper.

Office of Professional Management, 496 U.S. at 435 (White, J. and Blackmun, J., concurring).

As discussed in Republic's Brief on the Merits at 10, in *Nations v. Johnson*, 65 U.S. (24 How.) 195 (1860), this Court held that a party may not, by its unilateral act, "deprive the other party of all means of removing the cause to the appellate tribunal . . . by defeating the jurisdiction of the appellate court." 65 U.S. at 204. *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 454 (1932) ("[A]fter a final decree a party cannot defeat the jurisdiction of the appellate tribunal by removing from the jurisdiction, as the proceedings on appeal are part of the cause.")[4] The Government's Appropriations Clause argument is merely a pretext to encroach on the judiciary, which should be rejected.[5]

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[4] The Government does not address either of these cases.

[5] The Government's argument that the subject funds transferred by it to the Assets Forfeiture Fund are now "public funds" and thus not subject to return unless Congress authorizes it begs the ultimate question before this Court: If Republic is correct that the general rule of *in rem* jurisdiction applies — that initial seizure of the *res* is sufficient to confer jurisdiction throughout the case — then Republic has the right to an appeal, and the funds are not yet "public funds," as Republic's right to those funds has not been conclusively determined. Thus, merely to label the funds as "public funds" and then to argue that because they supposedly are, the appellate court cannot hear the case does not resolve the issue here. Likewise, if Republic is correct, the location of the property after initial seizure is irrelevant, and *Knote v. United States*, 95 U.S. 149 (1877), is

The Government's Appropriations Clause argument has been rejected by the appellate courts. *See United States v. $95,945.18*, 913 F.2d 1106, 1110 n.4 (4th Cir. 1990) ("reversal of a judgment of forfeiture" is viewed as "analogous to a suit for the refund of erroneously paid taxes or to recover for a wrongful levy"); *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990), *cert. denied*, __U.S.__, 111 S.Ct. 757 (1991) ("We do not believe that funds collected by the United States pursuant to a judgment of the District Court are insulated by the Appropriations Clause from return to the rightful owner in the event of a reversal of that judgment simply because the funds are held in the Treasury during the course of the litigation"). Even the Ninth Circuit — which initially accepted the argument — has, after further reflection, rejected it. In *United States v. Ten Thousand Dollars*, 860 F.2d 1511 (9th Cir. 1988), the court distinguished *United States v. $57,480.05*, 722 F.2d 1457 (9th Cir.), *cert. denied*, 469 v.s. 916 (1984) (cited at page 34 of the Government's Brief), and held that if the claimant prevails on appeal, "the money at stake may be restored by judicial action and need not wait for a congressional appropriation." 860 F.2d at 1514.

If a Congressional appropriation were necessary to restore the property, we submit that Congress has so acted and that there is express statutory authorization for the Government to repay the funds to Republic from the Treasury. Title 28 U.S.C. § 2465 provides:

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inapposite because in that case the forfeiture proceeding was concluded prior to the Executive's pardon.

Moreover, the Government does not seriously address the fact that when it purported to transfer the "funds" to the Assets Forfeiture Fund, it was not transferring a specific identifiable *res* but rather was creating a bookkeeping entry between two Government accounts. As discussed in Republic's Brief on the Merits at 15-16, the First and Third Circuits have concluded that the supposed transfer of forfeited funds from the jurisdiction "is nothing more than a shell game" and jurisdiction should not depend on which Government pocket holds the funds. *United States v. One Lot of $25,721 in Currency*, 938 F.2d 1417, 1420 (1st Cir. 1991). *See United States v. $1,322,242.58*, 938 F.2d 433, 437-38 (3d Cir. 1991).

> *Return of property to claimant; certificate of reasonable cause; liability for wrongful seizure:* Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent; but if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution.

Congress has authorized and directed the return of seized property in civil forfeiture proceedings to a claimant upon entry of judgment in its favor. The statute does not say it is limited to judgments of the district courts; if the appellate court entered judgment for the claimant on appeal, that court (or the district court on remand) could also direct return of the property under 28 U.S.C. § 2465. *Cf. Hatzlachh Supply Co., Inc. v. United States,* 444 U.S. 460, at 467 (1980) (Blackmun, J., dissenting) (28 U.S.C. § 2465 imposes duty on the United States to return property if forfeiture is not upheld).

The Government argues that it does not have the power or right to return money it transferred to the Assets Forfeiture Fund to satisfy a court order directing it to return the money. The Government, however, ignores the very statute it cites, which grants it express permission and power to use money from the Fund to pay liens and mortgages on forfeited property without separate Congressional appropriation. Title 28 U.S.C. § 524(c) established a "special fund to be known as the Department of Justice Assets Forfeiture Fund . . . which shall be available to the Attorney General without fiscal year limitation." Subsection (c)(1)(D) provides for the following payment by the Government:

> (D) [T]he compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by the Department of Justice, subject to the discretion of the Attorney

> General to determine the validity of any such lien or mortgage in the amount of payment to be made . . . .

In turn, by internal regulations, the Attorney General (or the designate) is authorized to make "payments and reimbursements" for several categories, including the following:

> "Payment of qualified third party interests." Qualified third party interests are those expenses incurred in the payment of valid liens, secured mortgages and debts owed to qualified general creditors *pursuant to court order* or a favorable ruling on a petition for remission or mitigation of the forfeiture. This includes the restoration of the proceeds of sale pursuant to a court order or an administrative determination. Nothing in this section shall preclude a departmental component from seeking reimbursement from the state or local agency that received the property that is the basis of the claim.

Attorney General's Guidelines on Seized and Forfeited Property, Section VII.B.3., *reprinted in,* 1 D. Smith, Prosecution and Defense of Forfeiture Cases, at App. 7B (1985) (emphasis added). Under this statute, the Government is empowered and authorized to remit the funds pursuant to court order without violating the Appropriations Clause.[6]

2. Sovereign Immunity.

> It is well established that:
>
> In the absence of clear Congressional consent, then, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States."

United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood,* 312 U.S. 584, 587-88 (1941)).

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[6] The Government asserts that it is "clear" that §524(c) "does not authorize" payment of the Bank's mortgage from the forfeited funds. Government's Brief at 34. A fair reading of subsection (c)(1)(D) above contradicts the Government's argument. Unlike §524(c)(1)(E), which relates to administrative petitions for remission and mitigation, §524(c)(1)(D) relates to "court orders," as even the Attorney General's own regulations, quoted above, explain.

Although the sovereign immunity doctrine protects the Government from many types of lawsuits instituted against the Government, it does not protect the Government from claims made by defendants (such as the Bank in this case) up to the amount of the Government's claim. This Court has consistently held that a defendant sued by the Government may, regardless of sovereign immunity, assert a set-off against the Government up to the full amount of the Government's claim. In *United States v. Ringgold*, 33 U.S. (8 Pet.) 150, 163 (1834), this Court explained:

> No direct suit can be maintained against the United States. But when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny him the right of setting up such claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defense, to a suit by the United States.

Similarly, in *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868), this Court reasoned:

> But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled.

As discussed above, *supra* at 7, the rule is even more liberal in admiralty actions. In *United States v. The Thekla*, 266 U.S. 328 (1924), the United States filed a claim in an admiralty case arising from a collision between two ships, one of which was being operated by the United States during war time. The trial court

found that the ship operated by the Government was at fault, and entered judgment against the United States.

This Court affirmed, holding that the district court was empowered by law to render a judgment against the Government, despite the Government's sovereign immunity argument. In explaining its ruling, Justice Holmes stated:

> When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it ....
>
> It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be a reasonable incident to the act.

266 U.S. at 339-41. *See American Propeller & Mfg. Co. v. United States,* 300 U.S. 475, 478 (1937); *cf. Guaranty Trust Co. v. United States*, 304 U.S. 126, 134 (1938) (in dicta, this Court said: "Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be reasonable incident of that act.").[7]

In this case, the Government sued to forfeit real property which was later converted to money when the real property was sold. The Bank, as mortgagee, filed a claim as authorized by Congress. 21 U.S.C. § 881. The Bank did not seek a money judgment against the Government but a determination that its mortgage is valid and superior to the Government's title claim under the forfeiture laws. Republic's claim was in the nature of an offset to the Government's claim, up to the amount owing on its

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[7] We do not suggest that the Government is exposed to claims against it in excess of the amount of its claim outside of the admiralty context. *See United States v. Shaw*, 309 U.S. 495 (1940).

mortgage.[8] Republic's claim that its mortgage is valid and that its interest is superior to the Government's does not violate the doctrine of sovereign immunity.

The Government's sovereign immunity argument has been rejected even in the Ninth Circuit, which otherwise has accepted the Government's *in rem* arguments. In *United States v. Ten Thousand Dollars*, 860 F.2d 1511 (9th Cir. 1988), the court rejected the sovereign immunity argument for a claim under $10,000, citing to the Little Tucker Act, 28 U.S.C. § 1346(a)(2):

> If a claim falls within the Act, the United States "has presumptively consented to suit." *United States v. Mitchell*, 463 U.S. 206, 216, 103 S.Ct. 2961, 2967, 77 L.Ed.2d 580 (1983). An action to recover an allegedly unlawful forfeiture under a revenue act is a claim founded upon a law of Congress. *Menkarell v. Bureau of Narcotics*, 463 F.2d 88, 90 (3rd Cir. 1972). The reasoning of *Menkarell* has been extended in this circuit to hold that a claim asserting that any forfeiture is unlawful is a claim seeking relief under the Tucker Act. *Simons v. United States*, 497 F.2d 1046, 1049 (9th Cir. 1974).[9]

860 F.2d at 1514; *see also In re Newport Sav. and Loan Ass'n*, 928 F.2d 472 at 478 (1st Cir. 1991) (court stated in *dicta* that in forfeiture actions, Government may not assert sovereign immunity).

The Government also argues that only Congress can make "exceptions" to the Government's reading of the *in rem* rule. The general rule is that *in rem* jurisdiction is complete on initial seizure and is not divested by subsequent removal of the property. Congress has never changed the rule, and has not passed any

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[8] Congress has waived sovereign immunity for actions involving title disputes on real property in which the United States claims an interest, 28 U.S.C. § 2409a, and for actions to foreclose a mortgage on real or personal property on which the United States claims a lien. 28 U.S.C. § 2410.

[9] *See* The Tucker Act, 28 U.S.C. § 1491(a)(1), which has the identical provision as to claims against the Government in excess of $10,000.

statute which provides that the Government's transfer of the *res* destroys appellate jurisdiction in civil forfeiture cases.[10]

Although Congress has enacted some statutes dealing with *in rem* jurisdiction, most *in rem* jurisdictional rules are judge-made and have been developed in case law over two hundred years. Congress has passed laws which state that initial seizure of the *res* is necessary, and laws which, for the Government's convenience, authorize the Government to move seized property outside the judicial district during the pendency of *in rem* proceedings.[11] And as discussed below, Congress has also expanded jurisdiction in civil forfeiture actions through 21 U.S.C. § 881(j).

III. 21 U.S.C. § 881(j) EXPANDS *IN REM* JURISDICTION IN CIVIL FORFEITURE CASES.

In its Brief on the Merits, Republic showed that 21 U.S.C. § 881(j) provides an additional basis on which the court retains jurisdiction in civil forfeiture actions regardless of the location of the property. In its Brief, the Government argues that § 881(j) "bears only on venue; it does not concern the Court's jurisdiction." Government's Brief at 40. The Government took the opposite position in at least one other court:

> The Government's position is that subsection 881(j) must represent a decision by Congress to extend *in rem* jurisdiction beyond the district in which the property is found

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[10] The proposed legislation, S.543, cited at the Government's Brief at 25, which would, if passed, preserve appellate jurisdiction in forfeiture actions even if the Government takes the property during the appeal, is consistent with and codifies the general rule in admiralty, discussed above, that *in rem* jurisdiction is complete on initial seizure. The proposed legislation adopts the view of the majority of circuit courts which have rejected the Government's position and rejects the contrary decisions of the minority circuits.

[11] The food and drug, customs and forfeiture statutes cited by the Government at 23-25 of its brief support Republic's position. Those statutes reaffirm that leaving property in the hands of the Government during the pendency of a case is appropriate because the court continues to have jurisdiction over the Government, and can order the Government to turn over the property at any time.

> because "[t]o create statutory venue powers without the attending jurisdictional basis would make § 881(j) a useless provision." Memorandum p.26. Thus, it is argued that, under 28 U.S.C. §§ 1395 and 881(j), this Court may properly assert *in rem* jurisdiction over property located outside of the Western District of New York.

United States v. U.S. Funds in the Amount of $3,035,648.50, No. Civ-91-217E, 1991 WL 236843 (W.D.N.Y. Nov. 4, 1991).

We submit that the Government's analysis and stated position in *U.S. Funds* is correct, and its conveniently-switched argument to this Court is wrong. As the Government affirmatively argued to the New York district court, if § 881(j) only bears on venue, then it is a meaningless statute, for venue cannot be broader than jurisdiction. If, as the Government contends here, the court may only assert *in rem* jurisdiction in a civil forfeiture case if the property is seized and controlled by the district court, then § 881(j), construed as a venue-only statute, would only empower the court to hear a civil forfeiture action where the property was located. Accordingly, although the statute purports to confer venue where the property owner is found or where the owner is indicted, the court would have no jurisdiction to hear the case in those locations unless the seized property was also there. Section 881(j), as so construed, would have no meaning, for the only proper venue would be the location of the property. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (statutes should not be construed to render them meaningless). The only logical interpretation of § 881(j) is, as the Government itself has argued elsewhere, that the statute, despite its title, expands *in rem* jurisdiction for civil forfeiture cases.

The Government also argues that § 881(j) is inapplicable here because when the Government bought suit, the owner of the property had not yet been indicted. According to the Government, the indictment, which occurred before the trial in this case was complete, came too late to be of jurisdictional significance. The Government again misconstrues § 881(j). The cornerstone of the Government's position is that the court must make continued

jurisdictional inquiries at every stage of the proceeding. *See, e.g.*, Government's Brief at 28. It follows that such inquiry would include the pertinent jurisdictional facts that exist at the time of the inquiry. Here, when the Government transferred the funds, another jurisdictional basis under § 881(j) existed: the owner had been indicted in the Southern District of Florida.

IV. THE GOVERNMENT'S REMOVAL OF THE PROPERTY DOES NOT MOOT THE APPEAL.

The Government expresses "serious concerns" that its removal of the funds has mooted the appeal. Government's Brief at 27. The Government's "concerns" are shared by only one of the circuits which sides with the Government, and there only tentatively. *See United States v. Certain Real and Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991) ("[T]his case probably could be viewed in terms of mootness.").

The Government's "case or controversy" argument is circular. The Government concedes that where the court can "re-arrest" the *res* or obtain *in personam* jurisdiction over the plaintiff, its "serious concerns" disappear. Government's Brief at 30 n.13. As discussed above *supra* at 4-7, this is precisely what will occur if the Eleventh Circuit reverses the judgment on the merits.

V. THE ABILITY OF CLAIMANTS TO APPEAL FORFEITURE JUDGMENTS SHOULD NOT DEPEND ON THEIR FINANCIAL RESOURCES OR DISCRETIONARY DECISIONS OF THE DISTRICT COURTS OR COURTS OF APPEALS.

According to the Government, in a civil forfeiture action, unlike other actions in which a judgment has been entered, a claimant may appeal only if it posts a supersedeas bond or obtains a stay. The claimant must accomplish this within 10 days of entry of judgment.

The Government does not even attempt to explain why a claimant should be required to post a bond where the Government has the property in its custody. The purpose of a supersedeas bond is to assure the party who won in the trial court that the judgment will be paid if execution is delayed. There is no rational

basis to require a losing party to post a bond as a condition precedent to appeal where there is no risk that the fruits of victory cannot be enjoyed after the appeal. The only purpose to such a requirement is to place substantial unnecessary obstacles to discourage appeals. This Court has previously refused to permit the remedial purpose of *in rem* jurisdiction to be used as a "weapon to defeat that very purpose." *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 23 (1960).

The Government's argument also makes the claimant's ability to appeal depend on discretionary decisions of the district courts or courts of appeals if the claimant does not wish, or is not able, to post a bond in the full amount of the value of property already in the hands of the Government. According to the Government's proposed rule, after judgment is entered the claimant must file a motion for a stay with the district court. Pursuant to Fed.R.Civ.P. 62(d), the district court has the discretion to grant or deny the stay. If the district court denies the motion, or does not rule by the tenth day after entry of judgment, the Government may immediately remove the property, thereby mooting any further decision by the district court (which has, under the Government's theory, thereby lost jurisdiction) and depriving the claimant of the right to appeal.

Nor does the Government's charitable suggestion that the courts of appeals can grant emergency stays help claimants wishing to appeal. A motion for stay must ordinarily be filed in the first instance in the district court. Fed.R.App.P.8(a). And if the district court denies the motion for stay, the appellate court (assuming it can act to preserve its jurisdiction before the Government defeats it by removing the property) also has discretion to grant or deny the motion for stay without a full supersedeas bond. Fed.R.App.P. 8(b). Under the Government's theory, then, a claimant is not entitled to appeal a civil forfeiture judgment if it cannot, or chooses not to, post a bond; it is only entitled to ask the district courts and appellate courts to make discretionary rulings which, if too late or adverse, preclude appellate review.

Congress has provided that the courts of appeals have jurisdiction over district court judgments forfeiting property. *See* 28 U.S.C. § 1291(a). Congress has not seen fit to eliminate appellate jurisdiction if the Government removes the property before or during the appeal. Accordingly, as discussed at Republic's Brief on the Merits at 6, the procedure to appeal a civil forfeiture judgment is prescribed by the Federal Rules of Appellate Procedure, which authorize an appeal in every case without posting a bond or obtaining a stay.

This Court has noted that the Government as litigant is held to a higher standard: Its task is not merely to win no matter what it takes, but rather to assure that justice is done. *See Berger v. United States*, 295 U.S. 78, 88-89 (1935). There is no compelling justification for the Government's proposed rule, and no justice in the result it seeks.

CONCLUSION

This Court should vacate judgment below, and order the appellate court to reinstate Republic's appeal.

Respectfully submitted,

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